EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

~~1286~~ No. 1287

United States Circuit Court of Appeals

For the Ninth Circuit.

HENRY W. CRUMRINE et al.,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ROY W. CANAGA et al.,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

No.

United States
Circuit Court of Appeals
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HENRY W. CRUMRINE et al.,

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiffs in Error:

DAVIS, RUSH & MacDONALD, Esqs., 600 Bryson Block, Los Angeles, California, and CHARLES L. ALLISON, Esq., San Bernardino, California.

For Defendants in Error:

ROBERT O'CONNOR, Esq., United States Attorney and WM. F. PALMER, Esq., Special Assistant United States Attorney, fourth floor Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) 2033 Crim.
)
HENRY W. CRUMRINE, et al.,)
)
Defendants.)
)
--------)
)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) 2047 Crim.
)
ROY W. CANAGA, et al.,)
)
Defendants.)
) Citation on
Consolidated.)
) Writ of Error.

UNITED STATES OF AMERICA,)
)
SOUTHERN DISTRICT OF CALIFORNIA,) SS.
)
SOUTHERN DIVISION.)

TO THE UNITED STATES OF AMERICA, AND TO ROBERT O'CONNOR, ESQ.,

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, wherein William G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller and Roy W. Canaga are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand and seal, at Los Angeles, California, in the said Southern District of California, this 5th day of January 1921.

Bledsoe
United States District Judge
for the Southern District of
California, Southern Division.

[Endorsed]: Original. District Court of the United States, Southern District of Cal. United States of America, Plaintiff, vs. Henry W. Crumrine, et al., Defendants. United States of America, Plaintiff, vs. Roy W. Canaga, et al., Defendants. Nos. 2033 Crim. and 2047 Crim. Consolidated. Citation on Writ of Error. Received Copy Jan. 7 1921 Robert O'Connor U S Atty

Davis, Rush & MacDonald Allison & Dickson Attorneys for Defendants. FILED JAN 7 1921 at — min. past — o'clock — M CHAS N. WILLIAMS, Clerk Louis J. Somers Deputy

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IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. HENRY W. CRUMRINE, et al., Defendants.) 2033 Crim.

UNITED STATES OF AMERICA, Plaintiff, vs. ROY W. CANA GA, et al., Defendants.) 2047 Crim.

Consolidated. (Writ of Error.

UNITED STATES OF AMERICA -- SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE

BENJAMIN F. BLEDSOE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, between William G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller and Roy W. Canaga, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened to the great damage of said William G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller and Roy W. Canaga, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White Chief Justice of the United States, the 6th day of January 1921.

(Seal)

Chas. N. Williams
Clerk of the United States
District Court, Southern
District of California,
Southern Division.

ALLOWED BY

Bledsoe
District Judge

I hereby certify that a copy of the within Writ of Error was on the 6th day of January 1921, lodged in the Clerk's office of the United States District Court for the Southern District of California, Southern Division, and with said plaintiff in error.

Chas. N. Williams
Clerk of the United States District Court
Southern District of California, Southern Division.

[Endorsed]: Original. District Court of the United States, Southern District of Cal. Southern Division. United States of America, Plaintiff, vs. Henry W. Crumrine, et al., Defendants. United States of America, Plaintiff vs. Roy W. Canaga, et al., Defendants. Nos. 2033 Crim. and 2047 Crim. Consolidated. Writ of Error. FILED JAN 6 1921 at — min. past — o'clock — M. CHAS. N. WILLIAMS, Clerk Louis J. Somers, Deputy Davis, Rush & MacDonald Allison & Dickson Attorneys for Defendants.

Oct. 22, 1919,

Viol: Act of August 10, 1917, as amended/ - Lever Act.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

At a stated term of said Court, begun and holden at the City of Los Angeles, County of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and twenty;

The Grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That HENRY W. CRUMRINE, GEORGE H. DUNKUM, J. R. MORRIS, HENRY BURNS, NORMAN SCOTT, JIM SCHOFIELD, SAM SOLOMON, WILLIAM BOLES, CLYDE H. ISGRIG, ED KELLEY, LON LINNEY, J. C. RHODES, M. W. MONAHAN, H. C. TIENAN, WILLIAM G. FANNON, O. T. LEFEVER, A. N. MILLER, R. C. SERF, C. C. CORNELL, GEORGE HAZEN, FRANK A. CUNNINGHAM, CLARENCE EDWARDS, GUY A. MESSICK, HARRY GOODMAN, ~~CARL J. HEIJNE, GEORGE W. GRAYDON, J. G. SCOTT,~~ and divers other persons to the Grand Jurors unknown, and A. E. LAWRENCE, C. R. COLBY, E. B. BUSSEY, HERBERT KETTLE, and JAMES WILLIAMS,

whose full and true names other than as herein stated

are, and the full and true name of each of them is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, did on or about the 6th day of April, A. D. 1920, knowingly, wilfully, unlawfully and feloniously conspire, combine, agree and arrange together and with other persons whose names are to the Grand Jurors unknown, to limit the facilities for transporting, supplying and storing many necessaries, to-wit: foods, feeds and fuel, including many carloads of oranges and lemons, and large quantities of potatoes, wheat, lettuce, cabbage, asparagus, live stock ready for slaughter for use as meat and fuel oil, by then and there and by means of agitating, calling and declaring a strike of railway yard men and switch men and such other railway train men, shop men and employees as could be induced to leave their employment, and the said defendants and each of them were at said time employees of railways having yards and terminals in the City of Los Angeles; that the said railroads, to-wit, the Los Angeles and Salt Lake Railroad, the Atchison, Topeka & Santa Fe Railroad and the Southern Pacific Railroad are concerned in and are engaged in transportation of passengers and freight in interstate commerce between the State of California and the various other states of the United States; and the defendants well knew that such railroads were engaged in carrying as freight all manner and description of foods, feeds and fuel oil, which commodities were necessaries as described and set forth in Section 1, of Title one, of an Act to amend an Act entitled, "An

Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, and to regulate rents in the District of Columbia,2approved October 22, 1919.

And the said defendants, well knowing such facts, began, instituted, agitated and spreak a strike among the switch men and other men who were engaged in handling the freight trains of the said railroad companies in the City of Los Angeles and in the State and Southern Division of the Southern District of California; and because of such conduct on the part of said defendants, a strike of the switchmen and yard men of said railroads in said district was declared, and the men employed by said railroad companies to handle their said freight trains as such yard men and switchmen refused to do and perform their duties as such employees of said railroad companies, and because of such strike and refusal of the said yard men and switchmen to perform their duties the said railroad companies were totally unable to transport or supply the said food stuffs, feeds and fuel oil, and by such action of the said defendants the transportation of such food stuffs, feeds and fuel oil was then and there prevented and the facilities for transporting the same were thereby limited; and because of such preventing and limiting of such transportation facilities, many hundred car loads of said food stuffs deteriorated and became spoiled and unfit for use as human food, and the transportation of

said animals for meat was prevented and the supply of meats was thereby curtailed.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Robert O'Connor,
United States Attorney.
W. F. Palmer,
Assistant United States Attorney.

(Endorsed): Original. No. 2033 Crim. UNITED STATES DISTRICT COURT, SOUTHERN *District of* CALIFORNIA SOUTHERN *Division.* THE UNITED STATES OF AMERICA *vs.* HENRY W. CRUMRINE, et al. INDICTMENT Viol. Lever Act of Oct. 22, 1919 *A true bill,* Ellwood De Garmo *Foreman.* FILED APR 19 1920 CHAS N. WILLIAMS, Clerk By Maury Curtis Deputy Clerk Bail, $5000.00 each Robert O'Connor

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AT A STATED TERM, to wit: The January A. D., 1920 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 10th day of May in the year of our Lord, One thousand nine hundred and twenty.

PRESENT: The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America, Plaintiff,

vs. No. 2033 S. D.

Henry Crumrine, Et al., Defendant

This cause coming on at this time for the hearing on demurrer of all defendants, Wm. F. Palmer, Esq., Assistant U. S. Attorney appearing as counsel for the plaintiff; Jud Rush, Esq., and H. L. Dickson, Esq., appearing as counsel for defendants; and said demurrer having been argued by Jud Rush, Esq., of counsel as aforesaid for the defendants; and Wm. F. Palmer, Esq., of counsel as aforesaid for the plaintiff, having argued in opposition thereto; and the Argument in support thereof having been closed by Jud Rush, Esq., of counsel for defendants; and the Court having duly considered the same, now orders that said demurrer be, and the same hereby is, overruled.

AT A STATED TERM, to wit: The July Term, A. D., 1920, Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the 15th day of July in the year of our Lord, One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America, Plaintiff,	)	
Vs.	)	No. 2033 Crim. S.D.
	)	No. 2047
Henry W. Crumrine, et al., Defendants	)	

This cause coming on at this time for sentence of William G. Fannon, Clyde H. Isgrig, Oscar T. Lefever and A. N. Miller, Defendants in Case No. 2033 Crim S. D., and Roy W. Canaga, defendant in case No. 2047 Crim. S. D., Wm. F. Palmer, Esq., Asst. U. S. Attorney, appearing as counsel for plaintiff; defendants being present on bail together with their counsel Jud Rush and H. L. Dickson, Esqs., and Jud Rush, Esq., having presented and filed motion for new trial and motion in arrest of judgment, and said motions having been argued by Jud Rush, Esq., of counsel as aforesaid, and both motions having been denied, and Jud Rush and H. L. Dickson, Esqs., having made statements in mitigation, the Court now pronounces sentence upon defendants for the crime of which they now stand convicted, viz: Vio. Act. Aug. 10, 1917, as amended Oct. 22, 1919. The judgment of the Court is that each defendant pay unto the United States a fine in the sum of $1,000.00 and to stand committed to the Los Angeles County Jail until said fine is paid. Now, upon motion of Jud Rush it is ordered by the Court that a ninety (90) days stay of execution of the judgment be granted each of said defendants, to remain at large upon the bonds heretofore given, and it is further ordered, upon motion of Jud Rush, Esq., of Counsel as aforesaid, that

defendants be granted thirty (30) days time within which to prepare, serve and file proposed bill of exception, in the event of appeal from the judgment pronounced.

Original

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

- - - - - -

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
-vs- : 2033 Crim.
)
HENRY W. CRUMRINE, et al.,)
Defendants.)

- - -

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
-vs- : 2047 Crim.
:
ROY W. CANAGA, et al.,)
)
Defendants.)

Consolidated) PETITION OF THE DEFENDANTS, WILLIAM G. FANNON, CLYDE H. ISGRIG, O. T. LEFEVER, A. N. MILLER and ROY W. CANAGA for a WRIT OF ERROR.

- - - - - - -

Your petitioners, William G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller and Roy W.

Canaga, defendants in the above entitled cause bring this, their petition for a writ of error to the District Court of the United States, in and for the Southern District of California, and in that behal*d*, your said petitioners say:

That on the 15th day of July, 1920, there was made, given and rendered in the above entitled court and cause a judgment against your petitioners whereby your petitioner, William G. Fannon, was adjudged and sentenced to pay a fine in the sum of $1000.00, and your petitioner, Clyde H. Isgrig to pay a fine in a like sum, and your petitioner, O. T. LeFever to pay a fine in a like sum, and your petitioner, A. N. Miller to pay a fine in a like sum, and your petitioner, Roy W. Canaga to pay a fine in a like sum, and your petitioners say that they are advised by their counsel and aver that there was and is manifest error in the records and proceeding had in said cause, and in the making, giving and entry of such judgments and sentences, to the great injury and damage of your said petitioners, and each of them, and each and all of which errors will be more fully made to appear by an examination of said records, and by an examination of the Bill of Exceptions and the Assignment of Errors which is filed with this petition, and to that end that the judgments, sentences and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners, and each of them, pray that a writ of error may be issued, directed therefrom to the said District Court of the United States, for the Southern District of California, Southern Division, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, Bill of Exceptions, Assignment of Errors and all proceedings had and to be had in said cause, and that the same may be removed unto the United

States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners and each of them.

And your petitioners make the Assignment of Errors filed herewith, upon which they, and each of them, will rely, and which will be made to appear by a return of the said record, in obedience to said Writ.

WHEREFORE, your petitioners pray and each of them prays the issuance of a writ as herein prayed, and that the Assignment of Errors filed herewith may be considered as their Assignment of Errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that they and each of them be awarded a supersedeas upon said Judgment, and all necessary process, including bail.

O. T. Le Fever
Wm. G. Fannon
A. N. Miller
Roy W Canaga
Clyde H. Isgrig by Davies Rush and McDonald, his Attys.

Davis Rush and MacDonald, and
Allison and Dickson
Attorneys for Defendants.

[Endorsed]: Original. Crim No 2033 Dept. ——— IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION UNITED STATES OF AMERICA Plaintiff vs. Henry W. Crumrine, et al. and Roy W. Canaga, et al., Defendants Nos. 2033 Crim. and 2047 Crim. Consolidated Petition of the Defendants, William G. Fannon, et al., for a WRIT OF ERROR Received copy of the within Petition for Writ of Error this 4" day of January 1921

Robt. O Connor Per Wm Fleet Palmer Attorney for ——Per BPF FILED JAN 4 1921 *at...min. past ...o'clock...M. CHAS. N. WILLIAMS, Clerk* Louis J Somers *Deputy* Allison & Dickson DAVIS & RUSH 600 Bryson Building Home 10985 Sunset Main 985 LOS ANGELES, CAL. Attorneys for Defendants

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IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,
vs. 2033 Crim.
HENRY W. CRUMRINE, et al.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,
vs. 2047 Crim.
ROY W. CANAGA, et al.,
Defendants.

Consolidated. (Order allowing (Writ of Error.

Upon motion of Davis, Rush & MacDonald and Allison & Dickson, attorneys for the defendants, William G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller and Roy W. Canaga, in the above entitled action, and upon filing the petition for a writ of error and assignment of errors, IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein; that pending the decision upon said writ of error the supersedeas prayed for by the aforesaid defendants in their petition for writ of error is hereby allowed, and the said defendant, William G. Fannon is admitted to bail upon said writ of error in the sum of $5,000 00/100; and the said defendant, Clyde H. Isgrig is admitted to bail upon said writ of error in the sum of $5,000 00/100; and the said defendant, O. T. LeFever is admitted to bail upon said writ of error in the sum of $5,000 00/100; and the said defendant, A. N. Miller is admitted to bail upon said writ of error in the sum of $5,000 00/100; and the said defendant, Roy W. Canaga is admitted to bail upon said writ of error in the sum of $2,000 00/100; said defendants being admitted to bail upon the bonds heretofore approved and filed herein.

Bledsoe
Judge of the District Court.

Dated this 5th day of January 1921.

[Endorsed]: Original. District Court of the United States, Southern District of Cal. Southern Division. United States of America, Plaintiff, vs. Henry W. Crumrine, et al., Defendants. United States of America, Plaintiff, vs. Roy W. Canaga, et al., Defendants. Nos. 2033 Crim. and 2047 Crim. Consolidated. Order allowing Writ of Error. FILED JAN 6 1921, at .. min. past .. o'clock .. M CHAS. N. WIL-

LIAMS, Clerk Louis J. Somers, Deputy Davis, Rush & MacDonald Allison & Dickson Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,
vs.) 2033 Crim.
HENRY W. CRUMRINE, et al.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,
vs.) 2047 Crim.
ROY W. CANAGA, et al.,
Defendants.

Consolidated.) Assignment of Errors by the defendants, William G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller, Roy W. Canaga.

The defendants above named, William G. Fannon, Clyde H. Isgrig, O. T. Le Fever, A. N. Miller and Roy W. Canaga and plaintiffs in error herein having petitioned for an order from the above named court permitting them to procure a writ of error therefrom directed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment and sentence made and entered in the said cause against said above named defendants, plaintiffs in error and petitioners herein, now make and file with their petition the following assignments of error, upon which they rely for a reversal of the said judgment and sentence upon the said writ, and which said errors, and each and every one of them, are to the great detriment, injury and prejudice of the defendants and in violation of the rights conferred upon them: and they say that in the record of the proceedings had in the above entitled cause, upon the hearing and determination thereof in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to-wit:

(Note: It was stipulated by all parties that all objections and exceptions taken by any of the above named defendants should be deemed and considered made and taken on behalf of each of the defendants unless otherwise specifically stated.)

The District Court of the United States in and for the Southern District of California, Southern Division, erred in each and every one of its rulings and decisions (to which exceptions were duly taken and allowed) now

here separately and specifically set out and numbered (with appropriate reference by number to the "Ruling and Exception No. ————", as the same appear in the bill of exceptions); said rulings and decisions, to which exceptions were taken, being as follows, to-wit:

ASSIGNMENT NO. I.

In overruling the general demurrer interposed by all of the defendants to the indictment herein, and to each and every allegation thereof. (Ruling and Exception No. 1.)

ASSIGNMENT NO. II.

In overruling the objections of the defendants to the question propounded to the Government witness, Pearl C. Gilson, and to each and every other witness that was called by the Government, as follows, to-wit: "Q. (By Mr. Palmer) Do you hold any official position with that organization? Mr. Rush: Just a moment. May it please the court, I want to interpose an objection at this time, so that we may maintain the position - - or at least not waive the position we have heretofore taken, and I object to this question on the ground that it is incompetent, irrelevant and immaterial; and ask that the same objection may be considered as going to all questions propounded to this and all other witnesses that may be called by the Government, on the ground that the testimony is incompetent, irrelevant and immaterial, for the reason that the indictment in this case does not charge any offense; and the basis of that is that the Act under which the indictment is

drawn and under which this prosecution is being conducted is unconstitutional and void.

The Court: The objection is overruled. That is the same matter presented in your demurrer.

Mr. Rush: Yes, your Honor.

The Court: Very well, the objection is overruled.

Mr. Rush: Exception." (Ruling and Exception No. 2.)

ASSIGNMENT NO. III.

That the District Court of the United States, Southern District of California, Southern Division, erred in overruling and denying the defendants' motion in arrest of judgment. (Ruling and Exception No. 3.)

ASSIGNMENT NO. IV.

That the District Court of the United States, Southern District of California, Southern Division, erred in overruling and denying the defendants' motion for new trial. (Ruling and Exception No. 4.)

ASSIGNMENT NO. V.

That the District Court of the United States, Southern District of California, Southern Division, erred in making, giving and rendering judgment against the defendants, or either of them, on the indictment herein, or upon any count thereof, for the reason that the said indictment does not, nor does any count thereof, state any offense against the laws of the United States of America, and that the Act or law under which said indictment was drawn is unconstitutional and void. (Ruling and Exception No. 5.)

ASSIGNMENT NO. VI.

The District Court of the United States, Southern District of California, Southern Division, erred in pronouncing sentence against the defendants, for the reason that the said indictment does not state a public offense against the laws of the United States of America, and that the said law under which the said indictment was drawn is unconstitutional and void.

Davis Rush and MacDonald
Allison and Dickson
Attorneys for the Defendants.

We hereby certify that the foregoing assignment of errors are made on behalf of the petition for a writ of error herein and are in our opinion well taken, and the same now constitute the assignment of errors upon the writ prayed for.

Davis Rush and MacDonald
Allison and Dickson
Attorneys for the Defendants.

[Endorsed]: Original. Crim 2033 District Court of the United States, Southern District of Cal. Southern Division. United States of America, Plaintiff, vs. Henry W. Crumrine, et al., Defendants. United States of America, Plaintiff –, vs. Roy W. Canaga, et al., Defendants. Nos. 2033 Crim. and 2047 Crim. Consolidated. Assignment of Errors. Recd the within assignment of Errors this 4th day of January 1921 Robt O Connor Per Wm. Fleet Palmer Per B P F FILED JAN 4 1921 *at . . . min. past . . . o'clock . . . M. CHAS. N. WILLIAMS, Clerk* Louis J Somers, *Deputy* Davis, Rush & MacDonald Allison & Dickson Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, VS.	PROPOSED AMENDMENT OF PLAINTIFF TO BILL OF EXCEPTIONS OF DEFENDANTS
HENRY W. CRUMRINE GEORGE H. DUNKUM J. R. MORRIS HENRY BURNS NORMAN SCOTT JIM SCHOFIELD SAM SOLOMON WILLIAM BOLES CLYDE H. ISGRIG ED KELLEY LON LINNEY J. C. RHODES M. W. MONAHAN H. C. TIENAN WILLIAM G. FANNON O. T. LEFEVER A. N. MILLER R. C. SERF C. C. CORNELL GEORGE HAZEN FRANK A. CUNNINGHAM CLARENCE EDWARDS GUY A. MESSICK HARRY GOODMAN A. E. LAWRENCE C. R. COLBY E. B. BUSSEY HERBERT KETTLE JAMES WILLIAMS, Defendants.	WILLIAM G. FANNON CLYDE H. ISGRIG O. T. LEFEVER A. N. MILLER ROY W. CANAGA --------- Nos. 2033 and 2047 Criminal, Consolidated.

BE IT REMEMBERED that heretofore, to wit: On the 19th day of April, 1920, the Grand Jury of the United States did find and return into the above entitled Court its indictment against the defendants, HENRY W. CRUMRINE, GEORGE H. DUNKUM, J. R. MORRIS, HENRY BURNS, NORMAN SCOTT, JUM SCHOFIELD, SAM SOLOMON, WILLIAM BOLES, CLYDE H. ISGRIG, ED KELLEY, LON LINNEY, J. C. RHODES, M. W. MONAHAN, H. C. TIENAN, WILLIAM G. FANNON, O. T. LEFEVER, A. N. MILLER, R. C. SERF, C. C. CORNELL, GEORGE HAZEN, FRANK A. CUNNINGHAM, CLARENCE EDWARDS, GUY A. MESSICK, HARRY GOODMAN, A. E. LAWRENCE, C. R. COLBY, E. B. BUSSEY, HERBERT KETTLE and JAMES WILLIAMS, charging the said named defendants as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

At a stated term of said Court, begun and holden at the City of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and twenty;

The Grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That HENRY W. CRUMRINE, GEORGE H. DUNKUM, J. R. MORRIS, HENRY BURNS, NORMAN SCOTT, JIM SCHOFIELD, SAM SOLOMON, WILLIAM BOLES, CLYDE H. ISGRIG, ED KELLEY, LON LINNEY, J. C. RHODES, M. W. MONAHAN, H. C. TIENAN, WILLIAM G. FANNON, O. T. LEFEVER, A. N. MILLER, R. C. SERF, C. C. CORNELL, GEORGE HAZEN, FRANK A. CUNNINGHAM, CLARENCE EDWARDS, GUY A. MESSICK, HARRY GOODMAN, and divers other persons to the Grand Jurors unknown, and A. E. LAWRENCE, C. R. COLBY, E. B. BUSSEY, HERBERT KETTLE and JAMES WILLIAMS, whose full and true names other than as herein stated are, and the full and true name of each of them is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, did on or about the 6th day of April, A. D. 1920, knowingly, wilfully, unlawfully and feloniously conspire, combine, agree and arrange together and with other persons whose names are to the Grand Jurors unknown, to limit the facilities for transporting, supplying and storing many necessaries, to-wit: foods, feeds and fuel, including many carloads of oranges and lemons, and large quantities of potatoes, wheat, lettuce, cabbage, asparagus, live stock ready for slaughter for use as meat and fuel oil, by then and there and by means of agitating, calling and declaring a strike of railway yard men and switch men and such other railway train men, shop men and employes as could be induced to leave their employment, and the said defend-

ants and each of them were at said time employes of railways having yards and terminals in the City of Los Angeles; that the said railroads, to-wit: the Los Angeles and Salt Lake Railroad, the Atchison, Topeka & Santa Fe Railroad and the Southern Pacific Railroad are concerned in and are engaged in transportation of passengers and freight in interstate commerce between the State of California and the various other states of the United States; and the defendants well knew that such railroads were engaged in carrying as freight all manner and description of foods, feeds and fuel oil, which commodities were necessaries as described and set forth in Section 1, of Title one, of an Act to amend an Act entitled, "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, and to regulate rents in the District of Columbia, approved October 22, 1919.

And the said defendants, well knowing such facts, began, instituted, agitated and spread a strike among the switch men and other men who were engaged in handling the freight trains of the said railroad companies in the City of Los Angeles and in the State and Southern Division of the Southern District of California; and because of such conduct on the part of said defendants, a strike of the switch men and yard men of said railroads in said district was declared, and the men employed by said railroad companies to handle their said freight trains as such yard men and switch men refused to do and perform their duties as such

employes of said railroad companies, and because of such strike and refusal of the said yard men and switch men to perform their duties the said railroad companies were totally unable to transport or supply the said food stuffs, feeds and fuel oil, and by such action of the said defendants the transportation of such food stuffs, feeds and fuel oil was then and there prevented and the facilities for transporting the same were thereby limited; and because of such preventing and limiting of such transportation facilities, many hundred car loads of said food stuffs deteriorated and became spoiled and unfit for use as human food, and the transportation of said animals for meat was prevented and the supply of meats was thereby curtailed.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

ROBERT O'CONNOR,
United States Attorney.
W. F. PALMER,
Assistant United States Attorney.

Indorsed:
A true bill,
Ellwood De Garmo
Foreman.

Filed this 19th day of April A. D. 1920
Chas. N. Williams,
Clerk.

Bail $5000.00 each
Robert O'Connor.

That thereafter, on the 26th day of April, 1920, the said defendants appeared in said Court and were duly arraigned upon the said indictment and thereafter on the 1st day of May, 1920, said defendants, WILLIAM G. FANNON, CLYDE H. ISGRIG, O. T. LEFEVER, A. N. MILLER and ROY W. CANAGA filed in said Court their demurrer to said indictment, which demurrer was in words and figures following, to-wit:

Come now the defendants, George H. Dunkum, Henry W. Crumrine, Harry J. Burns, John R. Norris, A. N. Miller, O. T. LeFever, William Boles, R. C. Serf, A. C. Solomon, Guy A. Messick, W. G. Fannon, W. W. Monahan, Norman Scott, J. C. Rhodes, Clyde H. Isgrig, James Schofield, H. C. Tieman, James Williams, Lon E. Linney, Edward J. Kelley, Clarence W. Edwards, Harry Goodman, E. R. Colby, Frank A. Cunningham, George N. Hazen, A. E. Lawrence, E. B. Bussey and C. C. Cornell and demur to the indictment herein on the following grounds, to-wit:

I.

That said Indictment does not nor dies any count or paragraph thereof state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or constitution of the United States of America.

WHEREFORE said defendants pray that this demurrer be sustained and that said indictment be dismissed.

Davis, Rush & MacDonald
Allison & Dickson
Attorneys for Defendants.

and thereafter on the 10th day of May, 1920, said demurrer was duly and regularly heard by said Court; on said day said Court duly and regularly made its order overruling said demurrer, to which order of the Court then and there made overruling the demurrer of said defendants the said defendants took an exception, which exception was then and there duly and regularly allowed and entered by the Court, and which defendants now assign as

RULING AND EXCEPTION NO. 1.

That thereafter, to-wit: on the 26th day of April, 1920, said defendants, WILLIAM G. FANNON, CLYDE H. ISGRIG, O. T. LEFEVER, A. N. MILLER, and ROY W. CANAGA entered their plea of Not Guilty to the offense as set forth in the indictment.

That thereafter upon the 1st dav of June, 1920, said cause came on duly and regularly for trial, the Government being represented by J. ROBERT O'CONNOR, ESQ., United States District Attorney, and by Messrs. W. F. PALMER and GORDON LAWSON, Assistant U. S. Attorneys, the defendants by Messrs. DAVIS, RUSH & MAC DONALD and Messrs. ALLISON & DICKSON.

Thereupon a jury to try the said cause was duly and regularly impaneled and the following proceedings took place on and during the trial, to-wit:

With the consent of the defendants the cases of the United States vs. Henry W. Crumrine, et al., No. 2033, Criminal, and the case of the United States vs. Roy

W. Canaga, et al., No. 2047, Criminal, and the United States vs. A. A. Crosby, et al., No. 181, Criminal, Northern Division, were consolidated for trial.

That thereupon the trial of said causes proceeded, testimony oral and documentary was offered and admitted, and the taking of evidence in said case commenced.

TESTIMONY OF PEARL C. GILSON FOR THE GOVERNMENT

PEARL C. GILSON,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

My name is PEARL C. GILSON. I reside in Fresno, California. Am a conductor on the Southern Pacific and have been employed there eleven years. Am a member of the Brotherhood of Railroad Trainmen.

Q. And do you hold any official position with that organization?

MR. RUSH: Just a moment. May it please the court, I want to interpose an objection at this time, so that we may maintain the position - - or at least not waive the position we have heretofore taken, and I object to this question on the ground that it is incompetent, irrelevant and immaterial; and ask that the same objection may be considered as going to all questions propounded to this and all other witnesses that may be called by the government, on the ground that the testimony is incompetent, irrelevant and immaterial, for the

reason that the indictment in this case does not charge any offense; and the basis of that is that the Act under which the indictment is drawn and under which this prosecution is being conducted is unconstitutional and void.

THE COURT: The objection is overruled. That is the same matter presented in your demurrer.

MR. RUSH: Yes, your Honor.

THE COURT: Very well, the objection is overruled.

MR. RUSH: Exception.

To which ruling the exception of the defendants was duly made and entered, and which ruling and exception the defendants here assign as

RULING AND EXCEPTION NO. 2.

That thereafter counsel for the prosecution and counsel for the defendants proceeded with the argument of said case. The arguments were completed and the Court proceeded to instruct the jury, and instructed the jury fully upon all points involved in this case.

That thereafter on the 19th day of June, 1920, the jury returned duly and regularly into Court, finding the defendants, WILLIAM G. FANNON, CLYDE H. ISGRIG, O. T. LEFEVER, A. N. MILLER and ROY W. CANAGA guilty as charged in the indictment.

And thereupon the Court continued the cause to Tuesday, July 6, 1920, at 10 o'clock A. M. for the sentence of the said defendants.

That on the said 6th day of July, 1920, the sentence of the said defendants was by the Court continued to July 15, 1920, at 10 o'clock A. M.

That thereupon, on the said 15th day of July, 1920, the defendants, WILLIAM G. FANNON, CLYDE H. ISGRIG, O. T. LEFEVER, A. N. MILLER and ROY W. CANAGA duly and regularly filed in said Court their motion in arrest of judgment, which said motion was in words and figures as follows, to-wit:

(TITLE AND CAUSE)

Motion of Defendants, W. G. Fannon, Clyde H. Isgrig, A. N. Miller, O. T. LeFever and Roy W. Canaga in Arrest of Judgment.

Come now the defendants, W. G. Fannon, Clyde H. Isgrig, A. N. Miller, O. T. LeFever and Roy W. Canaga, and jointly and separately move the Court to refrain from entering a judgment against either of them based upon the verdict rendered in this case, upon the following grounds:

I.

That the facts stated in the indictments do not constitute a punishable offense, or any offense or crime against the laws, or any law, or against the constitution of the United States of America.

Davis, Rush & MacDonald
Allison & Dickson,
H. L. Dickson
Attorneys for the above named Defendants.

That the Court thereupon heard the same and duly and regularly made an order denying the said motion in arrest of judgment, to which ruling the exception of

the defendants was duly made and entered, and which ruling and exception the defendants here assign as

RULING AND EXCEPTION NO. 3.

That thereupon on said 15th day of July, 1920, the said defendants, WILLIAM G. FANNON, CLYDE H. ISGRIG, O. T. LEFEVER, A. N. MILLER and ROY CANAGA duly and regularly filed with the above entitled Court their motion for a new trial, copy of which is herein set forth as follows, to-wit:

(TITLE AND CAUSE)

Motion of W. G. FANNON, CLYDE H. ISGRIG, O. T. LEFEVER, A. N. MILLER and ROY W. CANAGA for a New Trial.

Come now the defendants, W. G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller and Roy W. Canaga, in the above entitled action, jointly and separately, and move the Court that the verdict rendered in this action against them, and each of them, be set aside, and that they and each of them be granted a New Trial upon the following grounds:

I.

That the Court misdirected the jury in matters of law.

II.

That the Court erred in decisions of questions of law arising during the course of the trial.

III.

That the verdict is contrary to the law.

IV.

That the verdict is contrary to the evidence.

V.

That the verdict is contrary to the law and the evidence.

VI.

That the evidence is insufficient to sustain or justify the verdict.

VII.

That the Court erred in refusing to give each and every instruction requested by these defendants, and each of them, and in giving each and every of those instructions given by the Court at its own instance or upon request of counsel for the government.

VIII.

Because the verdict is against the weight of the evidence.

IX.

Because the Court erred in overruling the defendants' demurrer to the Indictments.

X.

Because the facts stated in the Indictments against these defendants do not constitute an offense against the United States.

XI.

Because the Court erred in refusing to instruct the jury at the request of these defendants, and each of them, to return a verdict of "Not Guilty" on said indictments as to each of these defendants.

XII.

Because the Court erred in admitting irrelevant evidence over the objection of the defendants.

XIII.

Because the Court erred in admitting incompetent evidence over the objection of the defendants.

XIV.

Because the Court erred in admitting immaterial evidence over the objection of the defendants.

XV.

Because the Court erred in sustaining the objections of the government to competent evidence offered by the defendants.

XVI.

Because the Court erred in sustaining the objections of the government to relevant evidence offered by the defendants.

XVII.

Because the Court erred in sustaining the objections of the government to material evidence offered by the defendants.

XVIII.

Because of other errors of law occurring at the trial, more fully shown by the transcript herein, which transcript is hereby referred to and relied upon by the defendants herein.

XIX.

Because of misconduct of counsel for the government occurring during the course of the trial.

XX.

Because of prejudicial remarks, appeals and arguments to the jury by counsel for the government, by which the defendants, and each of them were prevented from having a fair trial, all of which more fully appears from the transcript herein, which is hereby referred to and relied upon by the defendants.

WHEREFORE, the defendants pray that the verdict herein may be set aside, and that they and each of them may be granted a new trial.

Davis, Rush & MacDonald
Allison & Dickson,
H. L. Dickson
Attorneys for above named defendants.

That the Court thereupon heard the said motion for a new trial, and duly and regularly made an order denying said motion for a new trial, to which ruling the exception of the defendants was duly made and entered, and which ruling and exception the defendants here assign as

RULING AND EXCEPTION NO. 4.

That thereupon on said 15th day of July, 1920, the Court duly and regularly pronounced sentence upon the convicted defendants, W. G. Fannon, Clyde H. Isgrig, A. N. Miller, O. T. LeFever and Roy W. Canaga, as follows:

"The judgment of the Court is that each defendant pay unto the United States a fine in the sum of $1000 and to stand committed to the Los Angeles County Jail until said fine is paid."

The exceptions of the defendants to the said sentence were duly taken and allowed, which ruling and exception the defendants here assign as

RULING AND EXCEPTION NO. 5.

That thereafter, on the said 15th day of July, 1920, the Court duly and regularly entered its order in said cause, ordering that a 90-day stay of execution of the judgment be granted each of said defendants, said defendants to remain at large upon the bonds heretofore given.

That on the said 15th day of July, 1920, the Court duly and regularly entered its order in said cause granting the defendants thirty days' time within which to prepare, serve and file their proposed bill of exceptions in this case.

That thereafter and within the time so allowed by the Court the defendants served and submitted their proposed bill of exceptions.

That thereafter, by order of the Court duly made, the time for plaintiff to propose its amendments to the said proposed bill of exceptions was extended to and including December 1st, 1920.

That thereafter, by order of the Court duly made, the time for plaintiff to propose its amendments to the said proposed bill of exceptions was extended to and including December 10th, 1920.

That the plaintiff, by the United States District Attorney, hereby presents the foregoing as the defendants' amendment to the said proposed bill of exceptions heretofore submitted by the defendants, and re-

spectfully asks that the same may be settled and allowed as the bill of exceptions in this cause.

Davis, Rush & MacDonald
Allison & Dickson,
Attorneys for said defendants.

STIPULATION.

It is hereby stipulated that the foregoing amendments to the bill of exceptions heretofore submitted by the defendants may be settled and allowed by the Court as a true and correct statement of the proceedings in said case, in so far as the rulings and exceptions therein referred to are concerned.

Davis Rush and MacDonald
Allison and Dickson
Attorneys for Defendants.
Robert O'Connor
United States District Attorney.

The foregoing Bill of Exceptions, having been duly presented to the Court, the Same is hereby duly allowed and signed and made a part of the record in this cause.

Dated this 9th day of December, 1920. Bledsoe
Judge of the United States District Court.

[Endorsed]: Original. District Court of the United States, Southern District of Cal. Southern Division. United States of America, Plaintiff. vs. Henry W. Crumrine, et al., Defendants. United States of America, Plaintiff, vs. Henry W. Canaga, et al., Defendants. Nos. 2033 Crim. and 2047 Crim. Consolidated. PROPOSED AMENDMENT OF PLAINTIFF TO BILL OF EXCEPTIONS OF DEFEND-

ANTS. FILED DEC. 9, 1920 at — min. past — o'clock — M. CHAS N. WILLIAMS, clerk Louis J. Somers Deputy Davis, Rush & MacDonald Allison & Dickson Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. HENRY W. CRUMRINE, et al., Defendants.) 2033 Crim.

UNITED STATES OF AMERICA, Plaintiff. vs. ROY W. CANAGA, et al., Defendants.) 2047 Crim.

Consolidated.) STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by all parties to the above entitled cases that they were

by order of court duly made and entered, consolidated for trial, and that during the trial and all subsequent proceedings said cases were considered and conducted as one case consolidated; that the indictment in both of said cases charged the same acts as an offense against the United States of America in substantially the same language, the wording of said indictments being identical except as to the defendants and the dates of commission of the said offense.

IT IS FURTHER STIPULATED AND AGREED that a bill of exceptions was heretofore approved, settled and allowed by the Judge of the above entitled court as the bill of exceptions in both of said cases as consolidated, and that in all further proceedings the said bill of exceptions shall be considered and taken as the bill of exceptions in both of said cases as so consolidated, with the same force and effect as though an individual and separate bill of exceptions had been settled and allowed in each of said cases.

IT IS FURTHER STIPULATED AND AGREED that the said defendants in the United States vs. Crumrine, et al., Criminal No. 2033, and the United States vs. Canaga, et al., Criminal No. 2047, may conduct their further proceedings and appeal, should they so desire, in the said cases as so consolidated, as though they were one case, and may file one petition for a writ of error and one assignment of errors in said cases as so consolidated, and that all further proceedings had in said cases as so consolidated, on appeal or other-

wise, shall be considered and taken as though the said cases were but one case.

Robert O'Connor

United States Attorneys.
Davis Rush & MacDonald,
Allison and Dickson
Attorneys for Defendants.

[Endorsed]: Original. District Court of the United States, Southern District of Cal. Southern Division. United States of America, Plaintiff, vs. Henry W. Crumrine, et al., Defendants. United States of America, Plaintiff, vs. Roy W. Canaga, et al., Defendants. Nos. 2033 Crim. and 2047 Crim. Consolidated. Stipulation. FILED JAN 5 1921 ~~at~~ — ~~min.~~ ~~past~~ — ~~o'clock~~ — ~~M~~ CHAS. N. WILLIAMS, Clerk Louis J Somers Deputy

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United States of America
SOUTHERN DISTRICT OF CALIFORNIA, SS.

Be it Remembered, that on this 22 day of April in the year of our Lord one thousand nine hundred and 20 before me, Stephen G Long, a Commissioner duly appointed by the District Court of the United States for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, pursuant to the acts of Congress, in that behalf, personally appeared William G Fannon as principal, and Steven C Schenck and

Frank J. Wernett as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of ~~5,000~~ Five thousand dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The condition of the above recognizance is such, that, whereas, an indictment has been found by the Grand Jury of the United States for the Southern District of California, and filed on the 19 day of Apr A. D. 1920, in the District Court of the United States for said Southern District of California, charging the said William G. Fannon with the Viol of act of August 10th 1917 ~~with~~ ~~the~~ as amended Oct 22 1919 the Lever Act committed on or about the 6th day of April A. D. 1920 to wit, at the District aforesaid, contrary to the form of the statute of the United States, in such case made and provided;

And Whereas, the said William G Fannon has been required to give recognizance, with sureties, in the sum of Five Thousand dollars for his appearance;

Now, Therefore, if the said William G Fannon shall personally appear at the District Court of the United States for the Southern District of California, to be holden at the Court Room of said Court, in the City of Los Angeles, whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave

first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise to remain in full effect and virtue.

William G. Fannon [SEAL.]
Steven C. Schenck [SEAL.]
Mrs Rosa Phillips [SEAL.]

Acknowledged before me the day and year first above written,

(Seal) Stephen G Long
United States Commissioner Southern District of California.

SOUTHERN DISTRICT OF CALIFORNIA, ss.

Steven C Schenck and Mrs Rosa Phillips being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Five thousand Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Steven Schenck
Mrs Rosa Phillips

Subscribed and sworn to before me this 22 day of Apr A. D. 1920

Stephen G Long
United States Commissioner

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

(Seal) Stephen G Long
U. S. Commissioner

[Endorsed]: Original. No. 2033 Cr United States District Court, Southern District of California THE

UNITED STATES OF AMERICA *vs.* William G Fannon BOND TO APPEAR In the sum of $5000 With Steven C Schenck and Rosa Phillips as sureties. FILED APR 23 1920 at 30 min. past 1 o'clock p m. CHAS N. WILLIAMS, Clerk Louis J. Somers, *Deputy*

United States of America
SOUTHERN DISTRICT OF CALIFORNIA, SS.

Be it Remembered, that on this.....day of April in the year of our Lord one thousand nine hundred and twenty before me, Stephen G. Long, a Commissioner duly appointed by the District Court of the United States for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, pursuant to the acts of Congress, in that behalf, personally appeared C. H. Isgrig as principal, ~~and~~ $5000 in Liberty bonds being deposited by Michael Henry Monroe as surety, and himself ~~jointly~~ ~~and~~ ~~severally~~ acknowledges ~~themselves~~ to be indebted to the United States of America, in the sum of Five Thousand - - - - - dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The condition of the above recognizance is such, that, whereas, an indictment has been found by the Grand Jury of the United States for the Southern District of California, and filed on the 19th day of April

A. D. 1920, in the District Court of the United States, for said Southern District of California, charging the said C. H. Isgrig with the Vio. of Act of August 10, 1917, as Amended Oct 22, 1919, the Lever Act committed on or about the 6 day of April A. D. 1920 to wit, at the District aforesaid, contrary to the form of the statute of the United States, in such case made and provided;

And Whereas, the said C. H. Isgrig has been required to give recognizance, with sureties, in the sum of Five Thousand - - - - - - - dollars for his appearance;

Now, Therefore, if the said C. H. Isgrig shall personally appear at the District Court of the United States for the Southern District of California, to be holden at the Court Room of said Court, in the City of Los Angeles, whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise to remain in full effect and virtue.

Clyde H. Isgrig [SEAL.]
Michael Henry Monroe [SEAL.]

Acknowledged before me the day and year first above written,

(Seal) Stephen G Long
United States Commissioner Southern District of California.

SOUTHERN DISTRICT OF CALIFORNIA, ss.

. . . . . .

being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Five Thousand Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

. . . . . .

. . . . . .

Subscribed and sworn to before me this }
. . . . . day of . . . . . A. D. 191 . . }

. . . . . .

United States Commissioner

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

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[Endorsed]: Original. No. 2033 Cr United States District Court, Southern District of California THE UNITED STATES OF AMERICA *vs.* C. H. Isgrig BOND TO APPEAR In the sum of $5000 With Liberty Bonds & Surety and . . . . . as sureties . . . . . FILED APR 21 1920 at 58 min. past 3 o'clock P. M. CHAS N. WILLIAMS, Clerk Louis J Somers Deputy

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United States of America
SOUTHERN DISTRICT OF CALIFORNIA, SS.

Be it Remembered, that on this 22 day of April in the year of our Lord one thousand nine hundred and

twenty before me, Stephen G Long, a Commissioner duly appointed by the District Court of the United States for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, pursuant to the acts of Congress, in that behalf, personally appeared O T Lefever as principal, and Wm L Price and Mrs Rosa Phillips as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of Five Thousand dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The conditions of the above recognizance is such, that, whereas, an indictment has been found by the Grand Jury of the United States for the Southern District of California, and filed on the 19 day of Apr A. D. 1920, in the District Court of the United States, for said Southern District of California, charging the said O. T. Lefever with the Viol of Act of August 10th 1917 as amended Oct 22 1919 the Lever Act committed on or about the 6 day of April A. D. 1920 to wit, at the District aforesaid, contrary to the form of the statute of the United States, in such case made and provided;

And Whereas, the said O. T. Lefever has been required to give recognizance, with sureties, in the sum of Five Thousand dollars for his appearance;

Now, Therefore, if the said O. T. Lefever shall personally appear at the District Court of the United

States for the Southern District of California, to be holden at the Court Room of said Court, in the City of Los Angeles, whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise to remain in full effect and virtue.

O. T. LeFever [SEAL.]
Mrs Rosa Phillips [SEAL.]
Wm L Price [SEAL.]

Acknowledged before me the day and year first above written,

(Seal) Stephen G Long
United States Commissioner Southern District of California.

SOUTHERN DISTRICT OF CALIFORNIA, ss.

Mrs Rosa Phillips & Wm L Price being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Five Thousand Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Mrs Rosa Phillips
Wm L Price

Subscribed and sworn to before me this 22 day of Apr A. D. 1920

Stephen G Long
United States Commissioner

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

(Seal) Stephen G Long
U. S. Commissioner

[Endorsed]: Original. No. 2033 Cr United States District Court, Southern District of California THE UNITED STATES OF AMERICA *vs.* O T Lefever BOND TO APPEAR In the sum of $5000 With Mrs Rosa Phillips and Wm L Price as sureties..... FILED APR 23 1920 at 30 min past 1 o'clock P M. CHAS N WILLIAMS, Clerk Louis J Somers Deputy

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United States of America
SOUTHERN DISTRICT OF CALIFORNIA, SS.

Be it Remembered, that on this 22 day of April in the year of our Lord one thousand nine hundred and twenty before me, Stephen G Long, a Commissioner duly appointed by the District Court of the United States for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, pursuant to the acts of Congress, in that behalf, personally appeared Arles N Miller as principal, and..... as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of Five ~~three~~ thousand dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

With Robert Leittle George W Feller and Mrs Rosa Phillips as sureties.....FILED APR 23 1920 at 30 min past 1 o'clock P. M. CHAS. N. WILLIAMS, Clerk Louis J Somers Deputy

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Bond To Appear

United States of America

SOUTHERN DISTRICT OF CALIFORNIA, SS.

Be it Remembered, *that on this* 6th day of May in the year of our Lord nineteen hundred and twenty before me, H. W. Phipps, a Commissioner duly appointed by the District Court of the United States for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, pursuant to the acts of Congress, in that behalf, personally appeared R. W. Canaga as principal, and C. E. Williams and L. A. Kerr as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of Two Thousand ($2000) dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The condition of the above recognizance is such, that, whereas, an indictment has been found by the Grand Jury of the United States for the Southern District of California, and filed on the 30th day of April A. D. 1920, in the District Court of the United States, for said Southern District of California, charging the said

R. W. Canaga with the Violation of Act of Aug. 10, 1919, as amended Oct 22, 1919—Lever Act committed on or about the.....day of April A. D. 1920 to wit, at the District aforesaid, contrary to the form of the statute of the United States, in such case made and provided;

And Whereas, the said R. W. Canaga has been required to give recognizance, with sureties, in the sum of Two Thousand ($2000) dollars for his appearance;

Now, Therefore, if the said R. W. Canaga shall personally appear at the District Court of the United States for the Southern District of California, to be holden at the Court Room of said Court, in Los Angeles, California, on the 10th day of May A. D. 1920 at 10 o'clock a. m. of that day and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise to remain in full effect and virtue.

R W Canaga [SEAL.]
C E Williams [SEAL.]
L A Kerr [SEAL.]

Acknowledged before me the day and year first above written,

(Seal) H. W. Phipps

Commissioner U. S. Southern Court Southern District of California to take acknowledgments of bail, etc. United States Commissioner for the Southern District of California

United States of America } ss.
SOUTHERN DISTRICT OF CALIFORNIA, }

C. E. Williams and L. A. Kerr being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Two Thousand ($2000) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

C E Williams
L A Kerr

Subscribed and sworn to before me this 6th day of May, 1920

(Seal) H W Phipps

United States Commissioner U. S. Circuit Court for the Southern District of California.

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

(Seal) H W Phipps

United States Commissioner for the Southern District of California.

[Endorsed]: Original. No. 2047 United States District Court, Southern District of California UNITED STATES OF AMERICA *vs.* R W Canaga

BOND TO APPEAR In the sum of $2000/00 With C E Williams and L A Kerr as sureties.....
FILED JUL 16 1920 CHAS N WILLIAMS, Clerk
By Maury Curtis, Deputy Clerk

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF VS HENRY W. CRUMRINE, ET AL., DEFENDANTS UNITED STATES OF AMERICA, PLAINTIFF VS ROY W. CANAGA, ET AL., DEFENDANTS	CLERK'S OFFICE *No.* Crim. Nos. 2033 and 2047 Consolidated. PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue a Certified Transcript of the following matter and documents, or copies thereof, including indorsements, upon Writ of Error to the United States Circuit Court of Appeals, for the 9th Circuit, in the following, to-wit:

(1) Order overruling the demurrers of the defendants.
(2) Order denying defendants motion for new trial.
(3) Order denying defendants motion in arrest of judgment.
(4) Sentence and Judgment of the court.

(5) Bill of exceptions of defendants as approved and allowed by court.
(6) Stipulation consolidating cases on appeal.
(7) Petition for writ of error.
(8) Assignment of errors.
(9) Order allowing writ of error and bonds on appeal.
(10) Writ of error.
(11) Citation of the United States of America on Writ of Error.
(12) Names and addresses of attorneys of record.
(13) Bonds of defendants, William G. Fannon, Clyde H. Isgrig, O. T. LeFever, A. N. Miller and Roy W. Canaga.
(14) Order approving and settling bill of exceptions.
(15) Præcipe
(16) Certificate of clerk of United States District Court of record, and judgment roll.
(17) Indictment.

Davis Rush and MacDonald
Allison and Dickson
Attorneys for Defendants.

[Endorsed]: Original. *No.* 2033 and 2047 Consolidated. U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA United States of America vs. Henry W. Crumrine PRÆCIPE FOR Cert Transcript on Appeal *Filed* Jan 20 1921 Chas N. Williams *Clerk*. Louis J Somers *Deputy Clerk*.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

HENRY W. CRUMRINE *et al.*,)
Plaintiffs in Error,)
vs.)
UNITED STATES OF AMERICA,)
Defendant in Error,)
ROY W. CANAGA *et al.*,)
Plaintiffs in Error,)
vs.)
UNITED STATES OF AMERICA,)
Defendant in Error.)

I, CHAS N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing pages, numbered from 1 to inclusive, to be the transcript of record on writ of error in the above entitled cause, as printed by the plaintiffs in error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the indictment, order overruling demurrers of defendants, order denying defendant's motion for new trial, order denying defendant's motion in arrest of judgment, sentence and judgment of the court, bill of exceptions of defendants, order approving and settling bill of exceptions, stipulation consolidating cases, assignment of errors, petition for writ of error, order allowing writ of error,

writ of error, citation on writ of error, bonds of defendants, and præcipe.

I DO FURTHER CERTIFY that the fees of the clerk for comparing, correcting and certifying the foregoing record on writ of error amount to , and that said amount has been paid me by the plaintiffs in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of , in the year of our Lord one thousand nine hundred and twenty-one, and of our independence the one hundred and forty-fifth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By
Deputy.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Henry W. Crumrine et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

Roy W. Canaga et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

DAVIS, RUSH & MACDONALD,
ALLISON & DICKSON.
Attorneys for Plaintiffs in Error.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

IN THE

United States

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Henry W. Crumrine et al.,
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Defendant in Error.

Roy W. Canaga et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This case reaches the court upon a writ of error to the United States District Court, for the Southern District of California, Southern Division, Honorable Benjamin F. Bledsoe, judge.

The defendants Henry W. Crumrine, William J. Fannon, Clyde H. Isrig, O. T. LeFever and A. N. Miller were indicted under Indictment No. 2033 Crim., and the defendant Roy W. Canaga, was indicted under Indictment No. 2047, Crim. The two cases were consolidated for trial ad tried together, and a verdict of guilty rendered against all said five defendants. Thereafter two cases were consolidated by stipulation [Tr. p. 39] and approval of court for the purpose of this appeal. Reference herein made to the "Indictment" will therefore be intended to apply to the indictments in both cases. Reference herein made to the defendant will therefore be intended to apply to all defendants under both cases so consolidated.

The defendants herein, and plaintiffs in error, each for himself, interposed a demurrer to the indictment [Tr. p. 28] wherein they objected to its sufficiency upon the ground that said indictment failed to state facts sufficient to constitute a punishable offense, or any offense, or crime against the laws or Constitution of the United States of America.

The Act of Congress upon which the indictment and the prosecution thereunder is based is known as the "Lever Act," "An act to provide further for the national security and defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel." (40 Statutes at Large, 277.) Act found U. S. Compiled Statutes 1918, Compiled Statutes Annotated, Supplement, 1919,

section 3115 ⅛ ff, and upon section 4 thereof of said act as amended Oct. 22, 1919 (41 Statutes at Large 298). The act as amended reads:

(Sec. 4.) "It is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste, or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in Sec. 6 of this act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discrimatory and unfair, or any deceptive or wasteful practice or device; or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5000.00, or be imprisoned for not more than two years, or both; Provided, that this section shall not apply to any farmer, gardner, horticul-

turist, vineyardist, planter, ranchman, dairyman, stock man or other agriculturist with respect to the farm products produced or raised upon land owned, leased or cultivated by him; Provided, further, that nothing in this act shall be construed to forbid or make unlawful collective bargaining by the co-operative association or other association of farmers, dairyman, gardeners or other farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them.

And

Section 9: "That any person who conspires, combines, agrees or arranges with any other person (a) to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict the distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof shall, upon conviction thereof, be fined not exceeding $10,000.00 or be imprisoned for more than two years, or both."

The parts of this act of which we are concerned are:

"It is hereby made unlawful for any person * * * to conspire, combine, agree or arrange to with any other person (a) to limit the facilities for transporting * * * supplying and storing * * * in any necessaries. * * * Provided, That this section shall not apply to any farmer,

gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman or other agriculturist, with respect to the farm products produced or raised upon land owned, leased or cultivated by him; Provided, further, That nothing in this act shall be construed to forbid or make unlawful collective bargaining by the co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them."

The indictment in this case purports to charge the defendants with a crime against the United States under said act, and the defendants were arraigned, tried by a jury, convicted and sentenced thereunder. The defendants contend by their demurrer [Tr. p. 28] and by their objection to introduction of any evidence by the prosecution under the indictment [Tr. p. 30], by their motion for new trial [Tr. p. 33], and by their motion in arrest of judgment [Tr. p. 32] that the indictment does not state any offense against the laws of the United States of America, and that the act known as the "Lever Act" under which the indictment was drawn is unconstitutional and void.

Following the return of the verdict motions were duly made for a new trial and in arrest of judgment, and same were denied. [Tr. p. 12.] The defendants were sentenced and judgment of court was that each defendant pay unto the United States of America a fine in the sum of $1,000.00 and to stand committed to the Los Angeles county jail until said fine is paid.

In due course the defendants, each of them jointly sought and obtained a writ of error, and they are now before this Honorable Court on the consolidated bill of exceptions, assignment of errors and transcript of the record.

Specifications of Error Relied Upon by Plaintiffs in Error.

I.

The indictment fails to contain facts sufficient to constitute a punishable offense, and that the court erred in overruling the demurrer interposed to the indictment, because said act under which the indictment was drawn is unconstitutional and void, and contrary to the Fifth and Sixth Amendments to the Constitution of the United States of America.

(a) That said act is vague, indefinite and uncertain.

(b) That it fixed no immutable standard of guilt.

(c) That it did not inform the defendants of its violation and the nature of the accusation against them, nor as to what acts would constitute such violation.

(d) That said act fails to define a crime, but merely declared any person who should commit any unjust or unreasonable act should be guilty of a felony, and that if enforced it would deprive citizens of the United States of their property and liberty without due or any process of law.

(e) That Congress exceeded its powers in enacting such law under powers granted it by article I, Par. 11, 12, 13, 18 of Sec. 8 of the Constitution.

II.

Assignments of error Nos. 2, 3, 4, 5 and 6 contained in transcript page 21, 22, involve the same questions and points discussed in assignment No. 1.

ARGUMENT.

The principal ground relied on for reversal is that the act known as the Lever Act, or especially that part of said act in which we are concerned and reads:

> "(a) To limit the facilities for transporting * * * supplying, storing, or dealing in any necessaries, and also, provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him; provided further that nothing in this act shall be construed to forbid or make unlawful collective bargaining by the co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them"

is unconstitutional and void. Because the act is unconstitutional the demurrer interposed to the indictment

and also the Demurrer *Gora tenus* to the introduction of any evidence under the indictment should be sustained.

The defendants are charged in the indictment with well knowing the enactment of the "Lever Act" and with such knowledge "began, instituted, agitated and spread a strike among the switchmen and other men who were engaged on the freight trains of the said railroad companies * * * and bceause of said conduct on the part of said defendants, a strike of switchmen and yardmen of said railroads in said district was declared, and the men employed by said railroad companies to handle the said freight trains as such yardmen and switchmen refused to do and perform their duties as such employees of said railroad companies, and because of said strike and refusal of said yardmen and switchmen to perform their duties the said railroad companies were totally unable to transport or supply the said foodstuffs, feeds, and fuel oil; and by such action of the said defendants the transportation of such foodstuffs, feeds, and fuel oil was then and there prevented and the facilities for transporting the same were thereby limited," etc.

It is a fundamental principle of law that the right exists for men or any organization of men, when conditions of wage earners warrant it, to quit their work either singly or collectively and to encourage others to join with them to make a strike effective. It is the inherent and constitutional right that every citizen of the United States has to work or quit work as he

chooses. In Iron Moulders Union v. Allis-Chalmers Co., 166 Fed. 45, the court said:

> "To organize for the purpose of securing improvement in the terms and conditions of labor, and to quit work and to threaten to quit work as means of compelling or attempting to compel employers to accede to their demands for better terms and conditions, are rights of workmen so well and so thoroughly established in the law (Thomas v. Rid. Co. (C. C.) 62 Fed. 803; Arthur v. Oakes, 63 Fed. 320, 11 C. C. A. 209, 25 L. R. A. 414; Wabash Rld. Co. v. Hannahan (C. C.) 121 Fed. 563), that nothing remains except to determine in successive cases as they arise whether the means used in the endeavor to make the strike effective are lawful or unlawful."

Also same rule held:

U. S. v. Norris, 255 Fed. 435;

Duplex Press Co. v. Darring, 247 Fed. 198, affirmed in 252 Fed. 722;

Puget Sound, etc. v. Whitney, 243 Fed. 945.

And recognized in:

Hickman Coal Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260;

Wabash R. R. Co. v. Hannahan, 121 Fed. 563.

The indictment does not charge the defendants in doing any unlawful act except that the strike was in violation of the paragraph in which we are concerned—a part of the Lever Act. And it is nowhere shown that there was any force, violence, coercion or effort made

by defendants to interfere with their employers' rights in any manner, or to limit their facilities for transporting their many hundred carloads of foodstuffs as alleged in the indictment.

Except for the emergency of war there would be no question whatsoever that such an act would be unconstitutional and a clear interference with inherent rights of citizens of the United States and the punishment repugnant to the fifth amendment to the Constitution of the United States, which requires that "No person shall be deprived of his liberty as punishment for crime without due process of law."

This rule is well stated in Adair v. United States, 208 U. S. 161, 52 L. Ed. 436:

> "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the

service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee."

The Lever Act is an "emergency war measure." When the defendants ceased work and the time which they are charged with the alleged offense the war was actually over, though perhaps not technically so, and the use and purpose for which the measure was intended was at an end. As war ceased to exist in fact when the armistice was signed and announced to Congress by the President, the termination thereby of Act August 10, 1917. (Comp. St. Annotated Sup. 1919, paragraphs 3115⅛ E., 3115⅛ K.K., 3115⅛ L. and 3115⅛ R.)

A.

That said act is so vague, indefinite and uncertain, that no immutable standard of guilt is fixed. It fixes no definite or certain rule by which human conduct can be uniformly governed, and leaves such standard to the variance of the different courts and juries; that it does not inform the defendants of the nature of the cause of the accusation against them, or what acts constitute such violation; that said act fails to define a crime, but merely declares any person who should commit any unjust or unreasonable act should be guilty of a felony, and that if enforced it would deprive citizens of the United States of their property and liberty "without due process of law."

The act in question is repugnant to the Fifth and Sixth Amendments of the Federal Constitution. The clause of the Fifth Amendment relied on is "No person shall * * * be deprived of life, liberty or property without due process of law," and the Sixth Amendment is "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation." Under these clauses of the Constitution the sections of the Lever Act are so indefinite, vague and uncertain that the prosecution under either of them would deprive the defendants of their liberty without due process of law. A criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated acts are within or without the law. In this case the defendants "went on strike" depending upon their inherent and constitutional right to do so. Not one of the defendants, however intelligent he might be, in reading said act, could be warned by reading the same that by going on strike he would be doing an unlawful thing. In Railway Company v. Dey (C. C.), 35 Fed. 866, 1 L. R. A. 744, the court said:

> "No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may or what he may not do under it."

In Tozer v. U. S. (C. C.), 52 Fed. 917, the court further said:

> "In order to constitute a crime the act must be one which the party is able to know in advance

> whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

And in U. S. v. Brewer, 139 U. S. 278, on page 288, 11 Sup. Ct. 538, on page 541 (35 L. Ed. 190), the Supreme Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States v. Sharp, Pet. C. C. 118. Before a man could be punished his case must be plainly and unmistakably within the statute. United States v. Lasher, 134 U. S. 624, 628."

In applying the rule stated in these cases we contend that in determining the proper construction and meaning of the clause in said act referred to, especially the words, "to limit the facilities for transporting," etc., it is difficult to ascertain whether this statute has been violated. The statute itself furnishes no assistance in the way of answering the question. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated, and certainly the clause of the act is too vague, indefinite and uncertain to satisfy the constitutional requirements or to constitute "due process of law."

In United States v. Cruikshank, 23 U. S. Supt. Ct. Rep. 593, the Supreme Court said:

> "In criminal cases prosecuted under the laws of the United States the accused has the constitu-

tional right 'to be informed of the nature and cause of the accusation.' This was construed to mean 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged'."

And in U. S. v. Cook, 17 Wall 174 (84 U. S. 539), that

> "every ingredient of which the offense is composed must be accurately and clearly alleged * * *. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution of the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had."

The same rule is followed out in the following cases:

U. S. v. Reese, 92 U. S. 219, 23 L. Ed. 563;

McChord v. Louisville & N. R. R., 183 U. S. 498, 46 L. E. 296;

Cook v. State, 26 Ind. App. 489, 59 N. E. 489;

U. S. v. Witberger, 5 Wheat 95, 5 L. Ed. 42;

Cincinnati v. P. B. & S. R. R., 200 U. S. 179, 50 L. Ed. 428;

Shonee v. Anderson, 209 U. S. 434, 52 L. Ed. 875;

Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979;

Collins v. Kentucky, 234 U. S. 634, 58 L. Ed. 1510;

State v. Mann, 2 Ore. 238;

U. S. v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68;

Brown v. State, 137 Wis. 543, 119 N. W. 338;

R. R. Comm. v. Grank Trunk R. R., 179 Ind. 235, 100 N. E. 852;

American School v. McAnnulty, 187 U. S. 94, 47 L. E. 90;

Chicago R. R. etc. v. Polt, 232 U. S. 165, 58 L. Ed. 554;

Chicago, etc. v. Dey, 35 Fed. 866;

Louisville R. R. v. Kty., 35 S. W. 129, 33 L. R. A. 209;

Gulf R. R. v. Ellis, 165 U. S. 150, 41 L. Ed. 666;

Hocking Valley R. R. v. U. S., 210 Fed. 735;

International Harvester Co. v. Kty., 58 L. Ed. 1484.

It is the function of the judiciary to determine whether or not a certain or particular act comes within a given prohibition, depending upon wrongful intent. In determining this the judiciary must look to the generic statutory provisions. If this statutory provision is of such generality, vagueness and uncertainty that its limits can not be defined, how then is the judiciary going to function? How can the judicial body determine whether such acts fall within the given prohibition? So vague and variant is the statute before us

that no one can tell what course of conduct to take except by subsequent action of the jury. Under a crime so indefinitely defined and in its definition an element of degree as to which estimates may differ and as to which people's opinions may differ, the result would be that a man might find himself in prison because his honest judgment did not anticipate what a jury of less competent men would. It compels men to guess what a jury of twelve might think; whether his judgment is better than theirs.

Our Supreme Court in a very recent opinion by Mr. Chief Justice White upon the constitutionality of the very statute before us, in United States of America v. Cohen Grocery Co., decided Feb. 28, 1921, reported in the U. S. Sup. Ct. Advance Opinions, No. 10, page 300, says:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in

the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen form the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject. And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inserted by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

"That it results from the consideration which we have stated that the section before us was void, for repugnancy to the Constitution, is not open to question. United States v. Reese, 92 U. S. 214, 219, 220, 23 L. Ed. 563, 565; United States v. Brewer, 139 U. S. 278, 288, 35 L. ed. 190, 193, 11

Sup. Ct. Rep. 538; Todd v. United States, 158 U. S. 278, 282, 39 L. Ed. 982, 983, 15 Sup. Ct. Rep. 887; and see United States v. Sharp, Pet. C. C. 118, Fed. Cas. No. 16, 264; Chicago & N. W. R. Co. v. Dey, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919, 920; United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68; United States v. Pennsylvania R. Co., 242 U. S. 208, 237, 238, 61 L. ed. 251, 267, 268, 37 Sup. Ct. Rep. 95."

In the case at bar the only distinction between it and the case just above cited is that in the case at bar the defendants are alleged to have conspired and agreed and arranged among themselves to limit the facilities of transportation. It has been held in a very recent case by our Supreme Court that where the element of conspiracy is involved it does not change the rule as laid down in the Cohen Grocery Co. v. U. S. case above cited. Mr. Chief Justice White upon that point says in Weeds, Inc., et al. v. United States of America, U. S. Sup. Ct. Advance Opinions No. 0, at page 310:

"As the only difference between the charges in the L. Cohen Grocery Co. Case (..U. S..., ante, ..., ..Sup. Ct. Rep. ..), and those in this is the fact that here, in one of the counts, there was a charge of conspiracy to exact excessive prices, it follows that the ruling in the Cohen case is decisive here unless the provision as to conspiracy to exact excessive prices is sufficiently specific to create a standard, and to inform the accused of the accusa-

> tion against him, and thus make it not amenable to the ruling in the Cohen case. But, as we are of the opinion that there is no ground for such distinction, but, on the contrary, that the charge as to conspiracy to exact excessive prices is equally wanting in standard, and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the Cohen case, it follows, for reasons stated in that case, that the judgment in this must be reversed and the case remanded, with directions to set aside the sentence and quash the indictment."

We respectfully submit that the clause of said act "to limit the facilities for transporting necessaries" is equally as vague, indefinite and uncertain as the statute which was declared unconstitutional in the case of Cohen Grocer Co. v. U. S. above referred to.

B.

It is obvious that the Lever Act contains an arbitrary classification by Congress and repugnant to the "due process" clause of the Fifth Amendment. The power to make an arbitrary classification is arbitrary power and arbitrary power has no place in our system of government. The act exempts the farmer, gardener, horticulturist and other people engaged in the cultivating of lands and the raising of crops from the application of the act. In McGehee on Due Process of Law, page 60, says, "Purely arbitrary decrees or enactments of legislature directed aaginst individuals or

classes are held not to be 'the law of the land,' or to conform to "due process of law'."

And Willoughby on the Constitution, pp. 873, 874, says:

> "The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourtenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature, directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals of corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike,' and do not subject the individual to an arbitrary exercise of the powers of government."

We contend that the classification as attempted in said act is unreasonable and arbitrary.

> "It must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any

such basis. Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560, 22 Sup. Ct. 431, 439 (46 L. Ed. 679); Gulf, etc. Ry. Co. v. Ellis, 165 U. S. 150, 165, 17 Sup. Ct. 255, 41 L. Ed. 666."

In the Connolly case the court was dealing with the Anti-Trust Act of Illinois (Laws 1893, p. 182), condemning trusts or combinations or conspiracies to limit production, prevent competition, and fix prices. Section 9 of the act provided:

> "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

In holding the classification to be arbitrary the court said:

> "We have seen that under the statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturists and raisers of live stock, are all in the same general class; that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe."

Following the rule as laid down in the Connolly case, *supra,* we find that the Lever Act is entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel." Under this act foods, feeds and fuel are called necessaries, and the prohibitions are as to necessaries thus defined. Farmers, gardeners, ranchmen and many others engaged in like pursuits or people who produce foods and feeds are exempted by the act. Those exempted may knowingly commit waste or wilfully permit preventable deterioration of such foods and feeds in or in connection with their production, manufacture or distribution, may hoard such products, may monopolize or attempt to monopolize such products, may engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or may make any unjust or unreasonable rate or charge in handling or dealing in or with such products, and may conspire, combine, agree, or arrange with any other person to limit the facilities for producing or to restrict the supply or to restrict the distribution or to prevent, limit or lessen the production, to enhance the price, or exact excessive prices for such products, while all other persons are to be punished as criminals for doing the same acts. As in the case at bar, because the defendants, after the cessation of hostilities, exercised their constitutional right to strike, they are arrested, convicted and sentenced for doing no more than those mentioned as exempted are allowed to do under the same act.

It is also provided in said act that "nothing in this act shall be construed to forbid or make unlawful collective bargaining by any co-operative association, or other association, of farmers, dairymen, gardeners or other producers of farm products, with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them." Is as unwarranted as the clause just considered, and certainly the classification is arbitrary and not natural or reasonable, and is repugnant to the due process clause of the Fifth Amendment, and therefore void.

In Brown v. Jacobs Pharmacy Co., 41 S. E. 563, 90 Am. St. Rep. 150, 115 Ga. 453, which was a case determined by the Supreme Court of Georgia, that Supreme Court held:

> "The defendants in the court below attacked the constitutionality of this act" (Anti-Trust Act) "and one of the executions to the judgment is that the court erred in holding it to be constitutional. Since this case was heard and determined in the lower court and argued here the Supreme Court of the United States, in a decision rendered March 10, 1902, in the case of Connolly v. Pipe Company, 22 Sup. Ct. 431, 46 L. ed .., held the anti-trust statute of Illinois, which contained a provision that it should '*not apply to agricultural products or live stock in the hands of the producer or raiser*' (italics are ours) to be repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States because it denied the equal protection of the laws of that state to those within

its jurisdiction who were not producers of agricultural products or raisers of live stock. The Anti-Trust Act of this state above reefrred to, exempts from its operation 'agricultural products or live stock while in the possession of the producer or raiser.' Consequently, under the decision of the Supreme Court of the United States, we are constrained to hold that this exemption renders the act unconstitutional."

The same principle was held in the case of State v. Cudahy Packing Co. et al., 82 Pac. Rep. 833, by the Supreme Court of Montana.

In In re Grice, 79 Fed. 627, it is held that

"by 'equal protection of the laws' as used in the Fourteenth Amendment to the Constitution of the United States, is meant equal security under them to every one under similar terms, in his life, liberty, property and in the pursuit of happiness."

"A state statute, prohibiting all combinations in restriction of competition or trade, which exempts from its provisions '*agricultural products or live stock while in the hands of the producer or raiser*' (italics are ours) (the Texas anti-trust law of 1889), is class legislation and violates that part of the Fourteneth Amendment to the Constitution of the United States which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. And the fact that the persons thus exempted are not in a position to combine does not remove the objection to the discrimination in their favor."

While the cases referred to are under the Fourteenth Amendment of the Constitution, they come equally under the "due process of law" principle as announced under the Fifth Amendment of the Constitution. The limitation of the Fourteenth Amendment is "without due process of law." In the Foutreenth Amendment this limitation is accompanied with a prohibition of the denial of the equal protection of the laws. The latter expression is broader than the former. It must be conceded that a mere denial of the "equal protection of the laws" would necessarily became a part of the "due process of law" principle under the Fifth Amendment and binding upon Congress.

C.

Indeed, it has been seriously questioned whether Congress had the right under its powers to enact such a law, and that the act is outside the limitations of the Constitution of the United States. It is provided by Art. I, Sec. 8, Par. 18 of the Constitution that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." It is a matter of history that no other power of government was more contested than were these. The provisions were retained after critical and careful consideration with full understanding of their significance and were finally approved as necessary for the security and preservation of the nation.

There is a widely prevalent opinion that in time of war the Constitution and the laws whih govern in time

of peace are not to be observed, which includes the view that Congress is justified in assuming power not conferred on it by the Constitution. This conception of war powers is erroneous. The war power of Congress is a constitutional power; it is not a power outside the Constitution or above it. It is within the Constitution, a part of it. There is no necessity for Congress to exceed its war powers, as even war does not suspend the operation of the Constitution. This principle is recognized in *ex parte* Milligan, 4 Wall, page 2, 121 U. S. 127, 18 L. Ed. 281, and also recognized in the late decisions in the case involving the very statute before us for consideration.

In the case of United States v. Cohen Grocery Co., U. S. Sup. Ct. Advance Opinions No. 10, page 301, it was stated:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon." Citing *Ex parte* Milligan, 4 Wall. 2, 121-127, 18 L. ed. 281, 295-297; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Joint Traffic Asso., 171 U. S. 505, 571, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. 769, 1 Ann. Cas. 561; United States v.

Cress, 243 U. S. 316, 326, 61 L. ed. 746, 752, 37 Sup. Ct. Rep. 380; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 156, 64 L. ed. 194, 199, 40 Sup. Ct. Rep. 106.

The case at bar does not fall within the so-called "rule of reason" as laid down in the case of United States v. Nash, 229 U. S. 373, 57 L. ed. 1232. The logic of the Nash case is that if the accused departs from what is usual and customary he does so at the risk of what a court and jury may determine to be unjust and unreasonable, and a vague statute will be upheld where the subject matter will not permit the statute itself to be inflexible. Such is not the case with the subject matter of this case, and in Mr. Chief Justice Clarke's opinion in the Cohen Grocery Co. case, cited above, the court says:

"But decided cases are referred to which, it is insisted, sustain the contrary view. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 471, 29 Sup. Ct. Rep. 220; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; Fix v. Washington, 236 U. S. 273, 59 L. ed. 573, 35 Sup. Ct. Rep. 383; Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 Sup. Ct. Rep. 147; Omaechevarria v. Idaho, 246 U. S. 343, 62 L. ed. 763, 38 Sup. Ct. Rep. 323. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that, if the contention as to their effect were true, it would result, in view of the text of the statute, that no standard whatever was required, no information

as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of their plainly applicable provisions of the Constitution; and second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 58 L. ed. 1284, 1287, 34 Sup. Ct. Rep. 853; Collins v. Kentucky, 234 U. S. 634, 637, 58 L. ed. 1510, 1511, 34 Sup Ct. Rep. 924; American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 662, 59 L. ed. 773, 35 Sup. Ct. Rep. 456; and see United States v. Pennsylvania R. Co., *supra*."

In the case of United States v. Cohen Grocery Co., *supra*, the Supreme Court held that "Congress, in attempting, as it did in the Lever Act of Aug. 10, 1917, Par. 4 as re-enacted in the act of October 22, 1919, Par. 2, to punish criminally any person who wilfully makes 'any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' violates United States Constitution, Fifth and Sixth Amendments, which require an ascertainable standard of guilt, fixed

by Congress rather than by courts and juries, and secure to accused persons the right to be inforced of the nature and cause of accusations against them."

The same principle must be applied to the clause of the said act, viz., to limit the facilities for transporting, etc.

In Connolly v. Union Sewer Pipe Co., 184 U. S. 564, the court held that

> "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held to be inoperative. The first section of the act here in question embraces by its terms all persons, firms, corporations, or associations of persons who combine their capital, skill, or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect to their products

or stock in hand. Looking, then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section. Whether it is also within the prohibition against the deprivation of property without due process of law is a question which is unnecessary to consider at this time."

The same rule was followed in:

Muskrat v. United States, 55 U. S. Sup. Ct. Rep. 345;

Union Co. Nat. Bank v. Ozan Lumber Co., 127 Fed. 22.

For the foregoing reasons we respectfully urge that the errors occurring at the trial should be corrected by this Honorable Court and that the verdict of the jury in this case be set aside.

Respectfully submitted,

DAVIS, RUSH & MACDONALD,

ALLISON & DICKSON.

IN THE 3

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Henry W. Crumrine et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendants in Error.

Roy W. Canaga et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
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BRIEF OF DEFENDANT IN ERROR.

The question at issue in the case at bar is not controlled by the recent decision of the United States Supreme Court in The United States v. Cohen Grocery Co. That decision turned upon the uncertainty of that portion of section 4 of the Act of August 10, 1917, as amended October 22, 1919, that made it unlawful "wilfully to make any unjust or unreasonable rate

or charge in handling or dealing in or with any necessaries," or "to conspire, combine, agree or arrange with any other person to exact excessive prices for any necessaries." (41 Statutes at Large 298.)

U. S. v. Cohen Grocery Co., decided Feb. 28, 1921.

The indictment here under consideration charges that the defendants (appellants)

"* * * did on or about the 6th day of April, A. D. "1920, knowingly, wilfully, unlawfully and feloniously "conspire, combine, agree and arrange together and "with other persons whose names are to the Grand "Jurors unknown, to limit the facilities for transport- "ing, supplying and storing many necessaries, to-wit: "foods, feeds and fuel, including many carloads of "oranges and lemons, and large quantities of potatoes, "wheat, lettuce, cabbage, asparagus, live stock ready "for slaughter for use as meat and fuel oil, by then "and there and by means of agitating, calling and "declaring a strike of railway yard men and switch "men and such other railway train men, shop men "and employees as could be induced to leave their em- "ployment, and the said defendants and each of them "were at said time employees of railways having yards "and terminals in the city of Los Angeles; that the "said railroads, to-wit, the Los Angeles and Salt Lake "Railroad, the Atchison, Topeka & Santa Fe Railroad "and the Southern Pacific Railroad are concerned in "and are engaged in transportation of passengers and "freight in interstate commerce between the state of "California and the various other states of the United "States; and the defendants well knew that such rail-

"roads were engaged in carrying as freight all man-
"ner and description of foods, feeds and fuel oil, which
"commodities were necessaries as described and set
"forth in section 1 of title one, of an act to amend an
"act entitled 'An act to provide further for the na-
"tional security and defense by encouraging the pro-
"duction, conserving the supply, and controlling the
"distribution of food products and fuel, approved
"August 10, 1917, and to regulate rents in the District
"of Columbia,' approved October 22, 1919.

"And the said defendants, well knowing such facts,
"began, instituted, agitated and spread a strike among
"the switch men and other men who were engaged in
"handling the freight trains of the said railroad com-
"panies in the city of Los Angeles and in the state
"and Southern Division of the Southern District of
"California; and because of such conduct on the part
"of said defendants, a strike of the switch men and
"yard men of said railroads in said district was de-
"clared, and the men employed by said railroad com-
"panies to handle their said freight trains as such yard
"men and switch men refused to do and perform their
"duties as such employees of said railroad companies,
"and because of such strike and refusal of the said
"yard men and switch men to perform their duties the
"said railroad companies were totally unable to trans-
"port or supply the said foodstuffs, feeds and fuel oil,
"and by such action of the said defendants the trans-
"portation of such foodstuffs, feeds and fuel oil was
"then and there prevented and the facilities for trans-
"porting the same were thereby limited; and because
"of such preventing and limiting of such transporta-
"tion facilities, many hundred carloads of said food-
"stuffs deteriorated and became spoiled and unfit for

"use as human food, and the transportation of said "animals for meat was prevented and the supply of "meats was thereby curtailed. * * *"

This indictment clearly follows the terms and provisions of section 9 of the Act of August 10, 1917, which reads as follows:

> "Sec. 9. That any person who conspires, com- "bines, agrees, or arranges with any other per- "son (a) to limit the facilities for transporting, "* * *, supplying, storing, * * * any neces- "saries; * * * shall, upon conviction thereof, be fined not exceeding $10,000 or be imprisoned for not more than two years, or both."

Section 9 was not amended.

The indictment, then, is not affected by the Cohen decision, inasmuch as that decision was founded upon a construction of section 4 of the "Lever Act" as amended Oct. 22, 1919.

ARGUMENT.

We shall address ourselves to appellants' points *seriatim*.

I.

Since the indictment states an offense under section 9 of the Lever Act, and such section is not open to the objection of the attempt to classify the citizens and exempt certain classes from the operation of the section, "The principal ground relied on for reversal" (appellants' brief, p. 9) is cut from under appellants' appeal.

Both the demurrer and the demurrer *ora tenus* were properly overruled.

Much authority is cited to the effect that the men had the right to strike. One of the cases cited by appellant is Hitchman Coal Etc. Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260. But that case does not help appellant. The court says (p. 253):

> "Defendants set up, by way of justification or "excuse, the right of workingmen to form unions, "and to enlarge their membership by inviting other "workingmen to join. The right is freely con- "ceded, provided the objects of the union be proper "and legitimate, which we assume to be true, in a "general sense, with respect to the union here in "question. Gompers v. Bucks Stove & Range "Co., 221 U. S. 418, 439, 55 L. Ed. 797, 805, 34 "L. R. A. (N. S.) 874, 31 Sup. Ct. Rep. 492. The "cardinal error of defendants' position lies in the "assumption that the right is so absolute that it "may be exercised under any circumstances and "without any qualification; whereas in truth, like "other rights that exist in civilized society, it "must always be exercised with reasonable re- "gard for the conflicting rights of others. Bren- "nen v. United Hatters, 73 N. J. L. 729, 749, 9 "L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 65 "Atl. 165, 9 Ann. Cas. 698. The familiar maxim, "'*Sic utere tuo ut alienum non laedas*'—literally "translated, 'So use your own property as not to "injure that of another person,' but by more prop- "er interpretation, 'so as not to injure *the rights* "of another' (Broom, Legal Maxims, 8th Ed.

Section 20 of the Act of October 15, 1914, 38 Statutes at Large, 738, does not make any kind or character of a strike lawful. The Hitchman, Etc. v. Mitchell case disposes of that theory.

See:

United States v. Norris, 255 Fed. 423.

Even if there could be a question as to the effect of this section 20, yet the act under which the prosecution was conducted was passed August 10, 1917, some three years later, and, being the later declaration of the legislative will, would control.

Henrietta M. & M. Co. v. Gardner, 173 U. S. 123, 43 L. Ed. 637.

It must be conceded that men have the right to work and to quit work; to organize for protection, or advancement of their interests; to conduct themselves as free men, but the Clayton Act

"* * * does not have the effect of legalizing "any act which was previously unlawful."

Kroker Etc. Co. v. Retail Etc., 250 Fed. 890; U. S. v. King, 250 Fed. 908.

It is asserted in the brief that the war terminated at the time of the armistice. The existence of a state of war is determined by the political department of the Government, and the courts will take judicial notice of such determination, and are bound by it.

Hamilton v. Kentucky Dist. Co., 251 U. S. 160;

In re Wulzen, 235 Fed. 362.

II.

Answering Appellants' "A."

We present that the act, in so far as the case at bar is involved is neither vague, indefinite or uncertain and that the immutable standard of guilt is fixed. The act is not open to the charges against it. It is plain, definite and certain. It provides what necessaries are in section 1, and makes it unlawful to conspire to limit the facilities for their transportation both in section 4 and section 9.

The "due process of law" contention is untenable. The act complies with all the requirements laid down in the decisions cited by appellant on pages 14 to 17 inclusive. We deem it supererogation to distinguish the case at bar from the Cohen and like cases, recently decided by the Supreme Court. The court said:

> "Observe that the section forbids no specific or definite act."

The portion of the section with which the court was dealing at that time is thus quoted in the opinion:

> "* * * we reproduce the section so far as relevant (Act of Oct. 2, 1919, c. 80, Sec. 2, 41 Stat. 397):
>
> "'That it is hereby made unlawful for any per-"son wilfully * * * to make any unjust or "unreasonable rate or charge in handling or deal-"ing in or with any necessaries; to conspire, com-"bine, agree, or arrange with any other person "* * * (e) to exact excessive prices for any "necessaries * * * Any person violating any

"of the provisions of this section upon conviction "thereof shall be fined not exceeding $5000 or be "imprisoned for not more than two years, or both; "* * *"

The court, after holding that:

"the mere existence of a state of war could not "suspend or change the operation upon the power "of Congress of the guaranties and limitations "of the 5th and 6th amendments as to questions "such as we are passing upon." proceeds as follows:

"The sole remaining inquiry, therefore, is the "certainty or uncertainty of the text in question, "that is, whether the words 'That it is hereby "'made unlawful for any person wilfully * * * "'to make any unjust or unreasonable rate or "'charge in handling or dealing in or with any "'necessaries' constituted a fixing by Congress "of an ascertainable standard of guilt and are "adequate to inform persons accused of violation "thereof of the nature and cause of the accusa- "tion against them."

The court will note that this is a quotation from section 4 of the act and does not include any of the language of the act that applies to the violation at bar. The decision, therefore, cannot be construed to foreclose prosecutions under section 9, especially as section 22 of the act provides that if any clause, sentence, paragraph, or part of the act be adjudged to be invalid, this shall not affect or invalidate the remainder, but shall be confined in its operation to the clause, etc., directly involved.

The case of Weeds v. U. S., cited by appellant holds that a conspiracy to exact excessive prices is controlled by the Cohen case. This does not construe the law applicable to the case at bar.

III.

Appellant's "B."

Appellant has cited no case by the United States Supreme Court holding that the "due process of law" of the fifth amendment of the Constitution is violated by a law by Congress containing arbitrary classifications of the citizens.

We have found none. The doctrine of "due process of law" is older than Magna Charta and was embodied therein. It has been held that this phrase means "by the law of the land."

Murray v. Hoboken & Co., 15 U. S. 372;
Ochoa v. Hernandez y Morales, 230 U. S. 139;
Ex Parte Foscans, 208 Fed. 938;
Cooley, Cons. Lim., p. 434 (6th Ed. 1890).

It has been held that this phrase does not necessarily mean a trial or proceeding in court.

Davidson v. New Orleans 96 U. S. 102;
Public Clearing House v. Coyne, 194 U. S. 508;
Meeker v. Lehigh Val. R. Co., 236 U. S. 439;
In re Sing Lee, 54 Fed. 336;
Brown v. Lane, 232 U. S. 598.

The right of appeal is not essential to due process of law.

U. S. v. Heinze, 218 U. S. 532.

Deprivation of property without a proceeding in court is held not to contravene this provision.

Butterfield v. Stranahan, 192 U. S. 497.

The Interstate Commerce Act abrogating passes granted by railroads to individuals for life does not violate this provision.

Louisville Etc. Co. v. Mottley, 219 U. S. 467;
Delaware v. U. S. 231 U. S. 363.

The Food and Drugs Act providing for seizure approved:

Seven Cases v. U. S., 239 U. S. 510.

Webb Kenyon law not unconstitutional.

James Clark Dist. Co. v. Western Etc., 242 U. S. 326.

The Volstead Act does not transgress this provision, as was recently decided by our Supreme Court.

The "equal protection of the laws" provision is found in the fourteenth amendment and applies to the states only.

Am. Sug. Ref. Co. v. McFarland, 229 Fed. 284, 287;
Watson v. Maryland, 218 U. S. 173.

Even this provision permits a classification of the citizens where there is a reasonable and just cause therefor.

Connolly v. Union, Etc. Co., 184 U. S. 540, 560.

The object of the law under examination is declared to be,

> "* * * to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel, etc."
>
> Section 1, Act. Aug. 10, 1917, 40 Stat. 276.

To encourage production by farmers, etc., they were favored. This is no more a violation of the due process of law tenet than is the proposed emergency tariff on wheat with the same object.

But this argument and these authorities are not strictly in point here for the reason that section 9 of the act contains none of the exceptions complained of by appellant.

IV.

Appellants' "C."

It is undoubtedly true that the war power of Congress is a constitutional power. It is expressly given by the Constitution. Its power must not be exercised in contravention of the Constitution. The provision against limiting the facilities for transportation of necessities is no more unconstitutional than section one of the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. 209. This section provides that:

> "Every contract, combination in the form of "trust or otherwise, or conspiracy in restraint of "trade or commerce among the several states, or "with foreign nations, is hereby declared to be "illegal." And provides for punishment.

This section has been upheld, and applied to strikes and strikers.

U. S. v. Debs, 65 Fed. 210;
U. S. v. Cassidy, 67 Fed. 698;
Loewe v. Lawlor, 208 U. S. 274, 52 L. Ed. 488;
Thomas v. C. N. O. Etc. Ry., 62 Fed. 803, 12 C. J. p. 575, Sec. 79.

It is held by the courts that strikers may not impede or obstruct the transmission of the United States mails. The Lever Act makes conspiracies to limit transportation facilities for necessaries unlawful and hence a strike which has that effect is an unlawful strike just as is one which obstructs the mails.

The carrying of the necessaries of life is just as essential to the general welfare as the carrying of the mails. The indictment, then, charges an unlawful limiting of the facilities for transmitting and transporting necessaries. It is not open to any of the objections urged against it, and the judgment should be affirmed.

Respectfully submitted,

ROBERT O'CONNOR,
United States Attorney,
WM. FLEET PALMER,
Special Assistant United States Attorney.

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REPLY BRIEF OF PLAINTIFFS IN ERROR.

DAVIS, RUSH & MACDONALD,
ALLISON & DICKSON,
Attorneys for Plaintiffs in Error.

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Henry W. Crumrine et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendants in Error.

Roy W. Canaga et al.,
Plaintiffs in Error,
vs.
United States of America,
Defendants in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

In preparing the opening brief we anticipated that the defendant in error must of necessity, hold that the defendants Henry W. Crumrine, William F. Fannon, Clyde H. Isrig, O. T. LeFever and A. N. Miller were indicted under the act known as the "Lever Act" and particularly section 4 of said act (Open. Br. p. 5) and no other section of said act. Inadvertently on page 6 of the opening brief we added section 9 of said act.

On page 6 of the brief of the defendant in error we find these words:

"This indictment clearly follows the terms and provisions of section 9 of the Act of August 10, 1917, * * *." "This indictment is not affected by the Cohen decision, inasmuch as that decision was founded upon a construction of section 4 of the 'Lever Act' as amended Oct. 22, 1919."

On page 12 of the brief it is contended by the opposing side, after a discussion of the Cohen case, *supra*, that:

"The court will note that this is a quotation from section 4 of the act and does not include any of the language of the act that applies to the violation at bar. The decision, therefore, cannot be construed to foreclose prosecutions under section 9, etc."

And again on page 15 of said brief, the defendant in error dismisses our discussion of the subject under "B" with the statement which reads:

"But this argument and these authorities are not strictly in point here for the reason that section 9 of the act contains none of the exceptions complained of by appellant."

We have from the beginning been under the impression that the defendants were indicted under section 9 of said act, but not being sure, we prepared our brief on the theory that they were indicted under section 4 of said act, but respondent by its admission and contention has removed any uncertainty, and we are now convinced that the defendants were indicted under section 9 of the Act of Congress of Aug. 10, 1917. (Respondent's Brief, p. 6).

Therefore the defendants are charged with committing an offense on or about the 6th day of April, A. D. 1920 in violation of a section of an Act of Congress, which section was repealed long before the alleged offense was committed.

Act of Oct. 22, 1919, Ch. 80, 41 Stat. L. 297:

> "Sec. 3 (Certain Sections of Original Act Repealed). That sections 8 and 9 of the act entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved Aug. 10, 1917 be, and the same are hereby repealed: *Provided,* that any offense committed in violence of said sections 8 and 9 prior to the passage of this act, may be prosecuted and the penalties prescribed therein enforced in the same manner and with the same effect as if this act had not been passed. (41 Stat. L. 298."

It being, therefore, conclusive that section 9 of the Act of Aug. 10, 1917, under which act the defendants were indicted, was repealed about six months before the alleged offense in violation of said act was committed, the demurrers should have been sustained and the defendants discharged.

We insist that the judgment should be reversed.

Respectfully submitted,

DAVIS, RUSH & MACDONALD,

ALLISON & DICKSON,

Attorneys for Plaintiffs in Error.

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Memorandum of Argument of Defendant in Error.

ROBERT O'CONNOR,
United States Attorney.
WM. FLEET PALMER,
Special Assistant United States Attorney.

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Memorandum of Argument of Defendant in Error.

The opening brief of appellant quoted section 9 of the act of August 10, 1917—the "Lever Act"—as applicable to the case at bar. (Opening Brief p. 6.)

We followed in their wake and presented the case as though that section was in effect. Appellants' Reply Brief claims a reversal because section 9 of that act was repealed by section 3 of the amendatory act passed October 22, 1919—41 Stat. L. p. 297. But this oversight on the part of counsel cannot avail appellants.

It is true that appellee's brief refers to section 9 and claims certain advantages to the appellee because of the separation of the offenses that arise from the provisions in relation to the same being in different sections. (See Brief pp. 6 and 12.) But nevertheless, the argument of appellants is fully met by reason and authority, notwithstanding the erroneous injection of the repealed section 9.

The indictment itself states an offense under section 4 as amended. (See Br. p. 12.)

It was held in Williams v. U. S., 168 U. S. 382, 389, that:

> "We must look to the indictment itself, and if "it properly charges an offense under the laws of "the United States, that is sufficient to sustain it, "although the representative of the United States "may have supposed that the offense charged was "covered by a different statute."

See:

U. S. v. Nixon, 235 U. S. 231, 234 *et seq.;*

Vedin v. U. S., 257 Fed. 550, 551, 250 U. S. 663.

As a matter of fact the transcript shows that the indictment was for

"Viol.: Act of August 10, 1917, as amended Oct. 22, 1919,—Lever Act."

See:

Tr. p. 7, certified copy of indictment;

Tr. pp. 42, 45, 47, 50 and 53, bonds of appellants.

There was no misunderstanding at the trial and appellants were indicted and tried under section 4 of the act as amended. We hereby withdraw the statements in our answering brief which assume the prosecution was under section 9 of the original act.

Section 22 of the act of August 10, 1917, reads as follows:

> "If any clause, sentence, paragraph, or part of "this act shall for any reason be adjudged by any "court of competent jurisdiction to be invalid, "such judgment shall not affect, impair, or invali- "date the remainder thereof, but shall be confined "in its operation to the clause, sentence, paragraph "or part thereof, directly involved in the contro- "versy in which such judgment shall have been "rendered."

Under this provision the portion of section 4 held unconstitutional in the Cohen and Weeds decisions of the Supreme Court is distinct and separate from the portion thereof involved in the case at bar, and the holding in those cases does not, therefore, control.

Berea College v. Kentucky, 211 U. S. 45, 55;
6 R. C. L., Sec. 121, p. 121;
Constitution of California, Treadwell, 4th ed., XIII.

II.

We desire to cite as additional authority as to the inapplicability of the "equal protection of the laws"

clause of the Fourteenth Amendment, page 14 of our brief, as follows:

U. S. v. Sugar, 243 Fed. 423, 429;

Flint v. Stone Tracey Co., 220 U. S. 107, 159-160;

Lindsley v. Nat. Carbonic Gas Co., 220 U. S. 61, 78;

Johnston v. Kennecott Copper Co., 248 Fed. 407, 413.

III.

Appellants quote Adair v. United States, 208 U. S. 161, in Opening Brief (p. 12) to justify strike. But this very quotation modifies by use of the words

"—at least, in the absence of contract between the parties—."

The indictment charges that appellants unlawfully conspired to limit the facilities for transporting necessaries by means of agitating, calling and declaring a strike. The testimony at the trial showed that the Railroad Companies had contracts with the Railroad Brotherhoods to furnish the men to carry on the switching, and not to strike or leave the employment without first giving thirty days' notice of their intention so to do. The appellants were members of these Brotherhoods and by their conduct they breached the contract of their employment, for they left the service and agitated the strike which resulted in the tie-up of interstate commerce without any notice whatever to the Railroad Companies.

IV.

The indictment at bar surely sets out "the nature "and cause of the accusation," and it is sufficient "with "clearness and all necessary certainty to apprise the "accused of the crime with which he stands charged." The offense is stated with great particularity. There can be no doubt as to the matters intended to be charged and the meaning of the words of the indictment.

A comparison of that portion of section 4 of the Lever Act held to be invalid with the portion under consideration in this case, and an examination of the decision in United States v. Cohen Grocery Co., will demonstrate that the latter case is not analogous to the case at bar. The section in its entirety, as amended, with the portion applicable to the case at bar capitalized and the portion held invalid in the Cohen and Weeds cases italicized, is as follows:

> "IT IS HEREBY MADE UNLAWFUL FOR ANY PER- "SON wilfully to destroy any necessaries for the "purpose of enhancing the price or restricting the "supply thereof; knowingly to commit waste or "WILFULLY TO PERMIT PREVENTABLE DETERIORA- "TION OF ANY NECESSARIES IN OR IN CONNECTION "WITH THEIR production, manufacture, or DIS- "TRIBUTION; to hoard, as defined in section 6 of "this Act, any necessaries; to monopolize or at- "tempt to monopolize, either locally or generally, "any necessaries; to engage in any discriminatory "and unfair, or any deceptive or wasteful practice "or device, or *to make any unjust or unreasonable*

"*rate or charge in handling or dealing in or with* "*any necessaries;* TO CONSPIRE, COMBINE, AGREE, "OR ARRANGE WITH ANY OTHER PERSON, (A) TO "LIMIT THE FACILITIES FOR TRANSPORTING, pro- "ducing, harvesting, manufacturing, SUPPLYING, "STORING, or dealing in any necessaries; (b) to "restrict the supply of any necessaries; (c) TO "RESTRICT DISTRIBUTION OF ANY NECESSARIES; "(d) to prevent, limit, or lessen the manufacture "or production of any necessaries in order to "enhance the price thereof; or (*e*) *to exact exces-* "*sive prices for any necessaries,* or to aid or abet "the doing of any act made unlawful by this sec- "tion. Any person violating any of the provisions "of this section upon conviction thereof shall be "fined not exceeding $5000 or be imprisoned for "not more than two years, or both: Provided, "That this section shall not apply to any farmer, "gardener, horticulturist, vineyardist, planter, "ranchman, dairyman, stockman, or other agri- "culturist, with respect to the farm products pro- "duced or raised upon land owned, leased, or cul- "tivated by him: Provided further, That nothing "in this Act shall be construed to forbid or make "unlawful collective bargaining by any co-opera- "tive association or other association of farmers, "dairymen, gardeners, or other producers of farm "products with respect to the farm products pro- "duced or raised by its members upon land owned, "leased, or cultivated by them."

The entire reasoning of the court in the Cohen and Weeds cases is based upon the uncertainty of the stand-

ard provided by the words "unjust or unreasonable rate or charge" and "excessive prices."

No such uncertainty attaches to the words "to limit "the facilities for transporting, * * * supplying, stor- "ing * * *." These words are of a certain and ascertainable meaning. To limit means to restrain, to set bounds to. Hence the reason of the rule in the Cohen case excludes the charge in the case at bar; and as the only reason assigned for holding invalid the words involved in the Cohen case are their uncertainty, while the words of the statute in the case at bar are definite and certain to a common intent, it necessarily and logically follows that the portion of the section here involved must be upheld.

Respectfully submitted,

ROBERT O'CONNOR,

United States Attorney.

WM. FLEET PALMER,

Special Assistant United States Attorney.

No. 3649

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

H. E. FOLEY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record.

H. A. ELLIOTT, Esq., Clifton, Arizona,

Messrs. HAWKINS & FRANKLIN, El Paso, Texas,

Attorneys for Plaintiff in Error.

L. KEARNEY, Esq., Clifton, Arizona,

Attorney for Defendant in Error.

In Justice Court No. One Precinct, County of Greenlee, State of Arizona.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff above named complains of defendant and alleges as follows:

I.

That defendant during the time hereinn mentioned has been, and yet is, a railroad corporation, duly incorporated under the laws of the Territory (now State) of Arizona, and doing business as such under its corporate name, "THE ARIZONA AND NEW MEXICO RAILWAY COMPANY."

II.

That defendant is now and was, during the time hereinafter mentioned, engaged in the business of running and operating a railroad from the town of

Clifton, Arizona, to Hachita, New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and that defendant was, and yet is, a common carrier of freight and passengers for hire, and as such common carrier operated and operates freight and passenger trains for hire, in, on, over, and through said railroad, between said points, and during the times herein mentioned was engaged in interstate commerce on, over and through said line of railroad, and that it employs a large number of brakemen and other employees, whose business it was and is to run and operate said trains for hire, and were at the times and places herein mentioned engaged in interstate commerce on said railroad for defendant. [1*]

III.

That from the 31st day of December, 1916, to the 1st day of May, 1917, the plaintiff rendered 105 days' work to the defendant, which said 105 days' work were performed at the request of the defendant and upon its employment as brakeman on its trains on said line of railroad, in said interstate commerce, between said Clifton and Hachita:

IV.

That plaintiff as said brakeman, on defendant's said railroad, between said points, rendered to defendant on each of said 105 days' work, from 10 to 11 hours work each day.

That on December 31, 1916, and January 1st, 1917, the time of the beginning of said services, the

*Page-number appearing at foot of page of original certified Transcript of Record.

wages for brakemen on said railroad was at the rate of 52 cents per hour for ten hours' work.

That the Congress of the United States of America, on September 3d, 1916, passed a certain law, known as the "Adamson Act," which provided that said act should take effect and begin on January 1st, 1917, and which said act provided that eight hours, in contracts for labor and services, shall be deemed a day's work upon any railroad that is a common carrier and engaged in interstate commerce, and that for such eight hours' work the compensation of the employee shall not be diminished and that he shall receive the same pay per day as he had received for a ten hour work day.

That the said "Adamson Act" further provided that pending the report of the Commission therein provided for and for a period of thirty days thereafter, the compensation of railway employees subject to said act for a standard eight-hour work day shall not be reduced below the present standard days' wage, and for all necessary time in excess of eight hours such employee shall be paid at a rate not less than the *pro rata* for such standard eight-hour work day. [2]

That under the said eight-hour work day law, the employee would receive the same amount of wages as though he had worked a ten-hour day, and under the said ten-hour work day the plaintiff was receiving and being paid at the rate of 52 cents per hour, and under the eight-hour work day his compensation would be 65 cents per hour.

That when said "Adamson Act" became law the

defendant refused to recognize or be bound by it, and ever since has refused to recognize it as law or be governed by its terms and conditions, and compelled the plaintiff to work from 10 to 11 hours each day as brakeman aforesaid, and paid plaintiff the old rates existing under said ten-hour work day, at 52 cents per hour, when defendant should have paid plaintiff for all work done by him as aforesaid at the rate of 65 cents per hour, and that defendant refused to pay plaintiff according to the provisions of said "Adamson Act."

That plaintiff during said 105 days' work performed 231 hours work over and above said eight hour work day, and that defendant has refused to pay plaintiff for said 231 hours of extra labor performed over and above the said standard eight-hour work day, although it has been requested to pay the same.

That under the provisions of said "Adamson Act" the defendant owes the plaintiff for said 231 hours' labor at the rate of 65 cents per hour, or the sum of $150.00.

The defendant is indebted to plaintiff in the sum of $150.00 for said 231 hours of extra work, the same being at the rate of 65 cents per hour; all of which is long past due, and no part thereof has ever been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of one hundred and fifty ($150.00) dollars, with legal interest; together with the cost of this action.

L. KEARNEY,
Attorney for Plaintiff. [3]

CLERK'S NOTE: The foregoing complaint is a part of the certified copy of the Record on Removal, which record was sent to the District Court of the United States by the aforesaid Justice of the Peace Court, and is endorsed as follows:

No. 110—Tucson. In the United States District Court for the District of Arizona. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Certified Copy of Record on Removal. Filed this 26th day of June, A. D. 1917. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk. Hawkins & Franklin, Postoffice Address, El Paso, Texas. H. A. Elliott, Postoffice Address, Clifton, Arizona, Attorneys for Defendant. [4]

In the United States District Court for the District of Arizona, Tucson Division.

No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Answer.

Comes now The Arizona & New Mexico Railway Company, a corporation, the defendant above named, by its attorneys with this, its answer to plaintiff's complaint on file herein, and demurs

thereto and for ground of demurrer alleges and shows the Court:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays judgment as to the insufficiency of said complaint and for its costs.

HAWKINS & FRANKLIN,
H. A. ELLIOTT,
Attorneys for Defendant.

Further*ing* answering said complaint, and by way of answer thereto,

II.

Defendant denies generally and specifically each and every, all and singular, the allegations in said complaint contained.

WHEREFORE, having fully answered, defendant prays that plaintiff take nothing by his said action, and that it be hence dismissed with its costs in this behalf expended, and [5] whatever other relief may be deemed meet and proper by this Court.

HAWKINS & FRANKLIN,
H. A. ELLIOTT,
Attorneys for Defendant.

[Endorsed]: Filed this 25th day of July, 1917. Mose Drachman, Clerk. By Anna L. Ross, Deputy. [6]

In the United States District Court in and for the District of Arizona.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Agreed Statement of Facts.

Under and pursuant to the provisions of paragraph 510 of the Revised Statutes of the State of Arizona, 1913, Civil Code, it is hereby stipulated and agreed by and between H. E. Foley, the plaintiff above named, by his counsel, L. Kearney and F. E. Curley, and The Arizona and New Mexico Railway Company, a corporation, defendant above named, by its counsel, H. A. Elliott, that the matter in controversy in the above-entitled case be submitted upon an agreed statement of facts, and to that end said respective parties by their counsel above named, do hereby make and agree upon the following statement of facts, upon which facts judgment shall be rendered herein, to wit:

I.

Plaintiff is a citizen of the United States and a resident of the town of ———, State of California.

II.

Defendant is a railroad corporation organized and existing under and by virtue of the laws of the States of Arizona and New Mexico, and operates a

railroad as a common carrier for hire from the town of Clifton, Greenlee County, State of Arizona, through the town of Lordsburg, Grant County, New Mexico, to the town of Hachita, last named county and state; that defendant's said railroad is 111.94 miles in length. That defendant operates freight and passenger trains and employs engineers, firemen, conductors and brakemen and other servants to operate said trains. [7]

III.

That plaintiff entered the employ of defendant on the sixth day of August, 1916, and continued in such employment to and until the 27th day of April, 1917, and during said period was employed by defendant as a brakeman in interstate commerce.

IV.

That the engineers and firemen, the employees of this defendant company, are, and at all times mentioned herein were members of the Brotherhood of Locomotive Engineers and Firemen; that the conductors and brakemen, employees of this defendant company are, and at all times herein mentioned were members of the Brotherhood of Railroad Trainmen; that during the said period of plaintiff's employment by defendant, plaintiff was a member of said Brotherhood of Railroad Trainmen.

V.

That effective the first day of April, 1911, a schedule of wages and contract of employment were agreed upon and executed by and between this defendant company and the conductors and brakemen

in the employ of the company and the Brotherhood of Trainmen, representing and binding the conductors and brakemen of this defendant, which said schedule and contract of employment are in words and figures as follows, to wit:

"SCHEDULE OF PAY AND REGULATIONS FOR CONDUCTORS AND BRAKEMEN, ARIZONA & NEW MEXICO RAILWAY COMPANY.

The following rates of pay and regulations will govern the employment and compensation of conductors and brakemen in the service of The Arizona & New Mexico Railway Company, and will be in effect from April 1, 1911. No revision or abrogation of this agreement will be made without at least thirty (30) days in writing. All rates of pay, rules and regulations previously in effect are null and void.

ARTICLE I.

Section 1. Rates of pay in passenger service will be: Conductors, $182.00 per month with overtime at 60 cents per hour. Brakemen, $117.00 per month, with overtime at 38 cents per hour. Overtime to commence one hour after schedule—first hour not to be counted. Calendar days shall constitute a month. The regular crew will be guaranteed a full month's pay, provided they lose no [8] time on their own account.

Note: Trainmen not working a full month will be paid at a daily rate for the services performed.

Daily rate will be determined by dividing the

monthly rate by the number of days in the month during which the time is earned.

Section 2. Rates of pay in freight service will be: Conductors, $140.00 per month. Brakeman 42 cents per hour. Calendar working days to constitute a month. Overtime after ten (10) hours at *pro rata* rates.

It is agreed that the oldest freight crews will be kept in service at all times and receive a full month's pay. Extra crews to be paid proportionately for the amount and class of service performed.

Section 3. Rates of pay in work train service will be: Conductors $140.00 per month. Brakemen $107.50 per month. Calendar working days to constitute a month. Overtime after ten (10) hours at *pro rata* rates.

ARTICLE II.

Section 1. In all branches of train service in computing overtime; less than thirty (30) minutes will not be counted.

Thirty (30) minutes or more will constitute an hour and hour for hour thereafter.

Section 2. Trainmen making extra trips in addition to their regular runs shall be paid extra therefor at the regular rate for the class of service performed.

Section 3. Trainmen run from terminal to terminal or a lesser distance with an extra or special passenger train and doubling back with freight train or *vice versa,* will be paid one passenger day and overtime for the special and in addition one

freight day and overtime for the freight service. When freight cars are not handled either way, passenger pay will govern. When freight cars are handled, time for return trip is to commence thirty minutes after arrival at turning point unless leaving time is earlier.

Section 4. When necessary to run pilots, trainmen shall be employed as such, when available, and will receive freight conductors pay.

Section 5. Trainmen deadheading at the request of the company will be paid full time at the regular rate applicable to the service in which they are regularly employed.

Section 6. Trainmen on court duty for the company will be paid for full time lost and will be allowed their necessary expenses while away from home, same to be certified to by the attorney for the company. Extra trainmen shall receive not less than one day's pay and the necessary expenses for each twenty-four hours serving on court duty.

Section 7. Trainmen who are called and whose services [9] are not wanted, and who are held on duty five hours or less, shall be paid one-half day's pay. If held more than five hours and not over ten they shall receive one day's pay. If held over ten hours, they will be paid therefor at regular overtime rates.

Section 8. Trainmen retired from service on account of insubordination or sickness will be paid for the actual time worked. Trainmen called to relieve those retired on account of insubordination or sickness shall receive one-half day's pay for the first five

hours or less. If more than five hours, one day will be allowed and overtime if same is earned by other members of the crew.

Section 9. When time slips turned in by trainmen are not allowed they shall be so notified and same immediately returned for correction, and full explanation will be given why same are not allowed.

Section 10. When crews are required to accompany specials or for any other purpose leave the home line or division in charge of, or with a train, they shall receive actual time made as per Article 1, Section 1, and the sum of $2.50 per day for expenses.

ARTICLE III.

Section 1. The time of trainmen will begin at the time set for departure of their train, or time of departure if earlier, and time will be allowed on date train leaves terminal. If held in yard switching, or for any other cause, they will be allowed one hour terminal overtime for the first thirty (30) minutes and additional overtime for each succeeding hour. Overtime to be paid at regular overtime rates.

Section 2. Trainmen required to remain on duty switching or for any other cause after arriving at terminal stations, will be allowed one hour terminal overtime for the first thirty minutes and additional terminal overtime for each succeeding hour. Terminal overtime to be paid at regular overtime rates.

Section 3. Time on duty will be considered as from time trainmen are ordered to leave initial terminal until relieved at destination, and when terminal overtime does not obtain, all time on duty will be computed as road time.

Article 4. Sections 1 and 2, this Article, are not to [10] apply to crews performing work, or mixed work and revenue train service of crews running between Clifton and Duncan when such service intermingle.

Section 5. Initial time is to apply on first trip out, and terminal overtime on last trip in on turn around trips where this time is allowed.

ARTICLE IV.

Section 1. The age of trainmen will date from the time of entering the service of the company as such. As vacancies occur for conductors the brakemen will be promoted according to their ability and age in the service, after having passed the necessary examination. For every two men promoted the company will have the right to appoint a third man from the ranks or elsewhere as it may elect. A conductor so appointed shall hold seniority rights as brakemen from the day he entered the service. Passenger brakemen shall have equal rights with freight brakemen and *vice versa.*

Section 2. No brakeman shall be entitled to promotion to the position of conductor unless he has had at least one year's experience in freight train service.

Section 3. Freight conductors shall be promoted to passenger conductors according to their age in the service except when a freight conductor is not qualified to satisfactorily fill the duties of the position, in which case he shall be notified of the objection in writing.

Section 4. The oldest extra freight conductors shall be given preference. Vacancies of fifteen days

or less caused by regular brakemen laying off, will be filled by extra men from the extra board when available, and not be men who are holding extra cars. The senior freight conductors and brakemen may do the extra passenger and special passenger work if they so desire.

ARTICLE V.

Any trainman deeming he is unjustly dealt with shall have the right to a full investigation and be represented by his organization if he so desires, and if it is decided that he has been wrongfully disciplined, he will be reinstated and paid not less than he would have received if he had remained in the service. His appeal, however, must be made within sixty days and he will be given a hearing within ten days of such appeal. [11]

ARTICLE VI.

Section 1. Leave of absence will not be granted for more than ninety days except in case of sickness.

Section 2. When trainmen leave the service they will be given letter showing length of service, class of employment and cause for leaving provided they have been in the service one month or more.

ARTICLE VII.

Trainmen after continuous service of twelve hours shall have the right to take eight hours rest except in case of wrecks and washouts; provided, that no crew will be tied up for the rest except at terminals or to conform with the provisions of the law. The time for rest shall commence one hour and thirty minutes after time relieved. Trainmen to be the judge as to whether they need rest or not.

ARTICLE VIII.

Section 1. During the summer season cabooses and yard crews will be furnished ice at all terminals where it can be had.

Section 2. Crews will be allowed a reasonable time in which to eat at all meal stations. At terminals where meals can be had, crews are required to be with trains thirty minutes before leaving time.

ARTICLE IX.

Conductors will not be required to take out inexperienced brakemen, when acceptable experienced brakemen are available. A brakeman having been objected to by two or more conductors in writing for good and sufficient reasons, will be dismissed from the service.

ARTICLE X.

Section 1. Trainmen cannot be tied up between terminals except to take rest or when they are blocked by washouts or wrecks, and when so tied up they will be allowed a minimum of ten hours' pay to, and ten hours from the tying-up point, and in addition thereto, twelve hours' pay for each twenty-four hours so held. Time for crews tied up on account of the law is to begin at the end of the legal rest period. Crews in road service will not be tied up for rest [12] unless it is apparent that the trip cannot be completed within the lawful time and not then until after the expiration of fourteen hours' duty under the Federal law, or within two hours of the time limit provided by State Laws if State Laws govern.

Section 2. Crews in work train service may be

tied up at intermediate points where provisions can be had provided that no single tie-up will be longer than twelve hours. Time to begin at the expiration of the twelfth hour.

Section 3. Clifton and Hachita are freight terminals, Clifton—only is passenger terminal.

ARTICLE XI.

Brakemen will not be required to go out on runs with less than full crews. Conductors will be held responsible for handling trains without air until such times as they can notify the proper officials.

Air hose to be coupled and uncoupled by car inspectors at all terminals where car inspectors are on duty.

ARTICLE XII.

Train crews on the main line will not be required to perform any duty except that of conductor or brakeman except in emergency cases. Trainmen will not be required to shovel down coal. Train will assist in turning engines at Clifton.

ARTICLE XIII.

Train crews will not be required to load to exceed five thousand pounds of freight at any one station, nor will they be required to unload to exceed five thousand pounds out of any one car at any one place.

P. REISINGER,
For Arizona & New Mexico Railway.
W. C. BUELL,
J. B. KLINE,
W. E. MITCHELL,
R. M. McINTYRE,
For the B. of T.
Per W. E. MITCHELL." [13]

That last-named schedule and contract of employment is hereinafter referred to as schedule "A."

That said schedule "A" constituted and was the contract of employment between this defendant and its conductors and brakemen during the time said schedule was in force and effect.

VI.

That under the date of March 29, 1916, the Brotherhood of Railroad Trainmen, comprising the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Engineers and the Brotherhood of Trainmen, being national associations of engineers, firemen, conductors and brakemen, engaged in railway service in the United States, submitted to the railway employers of the United States, the following schedule of demands to govern between the railway employers of the United States and their trainmen.

"Article 1. (a) In all road service 100 miles or less, 8 hours or less will constitute a day, except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.

(b) On runs of 100 miles or less, overtime will begin at the expiration of 8 hours.

(c) On runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by 12½ miles per hour.

(d) All overtime to be computed on the minute basis and paid for at time and one-half times the *pro rata* rate.

(e) No one shall receive less than eight hours or 100 miles than they now receive for a minimum day

or 100 miles for the class of engine used or for service performed.

(f) Time will be computed continuously from time required for duty until released from duty and responsibility at end of day or run.

Article 2. (a) Eight hours or less will constitute a day in all yard and switching service. The minimum day's pay for 8-hour yards shall not be less than the present day's pay for 10-hour yards; provided that in yards having a minimum day of more than 10 hours the present day's pay as in effect January 1, 1916, will be continued with the 8-hour day.

(b) Time to be computed continuously from time required for duty until released from duty and responsibility at end of day or run. All over 8 hours within any 24-hour period to be computed and paid for at the rate of time and one-half time.

(c) Al overtime to be computed on the minute basis. [14]

Article 3. (a) Eight hours or less at present 10-hours' pay will constitute a day's work in hostling service.

(b) Time to be computed continuously from time required for duty until released from duty and responsibility at end of day or run. All over 8 hours within any 24 hour period to be computed and paid for at the rate of time and one-half time.

(c) All overtime to be computed on the minute basis.

Article 4. Any rates of pay, including excess mileage or arbitrary differentials that are higher, or any rules or conditions of employment contained in

individual schedules in effect January 1, 1916, that are more favorable to the employees, shall not be modified or affected by any settlement reached in connection with these proposals. The general committee representing the employees of each railroad will determine which is preferable and advise the officers of their company. Nothing in the settlement that may be reached on the above-submitted articles is to be construed to deprive the employees on any railroad from retaining their present rules and accepting any rates that may be agreed upon or retaining their present rates and accepting any rules that may be agreed upon."

The last-named schedule and demands on the part of said Brotherhood of Trainmen is hereinafter referred to as Schedule "B."

That the locomotive engineers, firemen, conductors and brakemen of this defendant company and plaintiff are now and at all times herein and in plaintiff's complaint mentioned were members of said Brotherhood.

VII.

That during the month of June, 1916, at which time were then pending negotiations between the railway employees of the United States and said Brotherhoods of Trainmen, the train employees of this company presented for consideration of defendant a proposed new wage schedule upon the 8-hour and time and one-half overtime basis, among which schedules and demands was one made in behalf of conductors and brakemen of defendant company, in words and figures as follows, to wit: [15]

"SCHEDULE OF PAY AND REGULATIONS FOR CONDUCTORS AND BRAKEMEN ON ARIZONA & NEW MEXICO RAILWAY COMPANY.

The following rates of pay and regulations will govern the employment and compensation of conductors and brakemen in the service of the Arizona & New Mexico Railway Company, and will be in effect from

No revision or abrogation of this contract or agreement will be made without at least thirty (30) days' notice in writing. All rates of pay, rules and regulations previously in effect are null and void.

ARTICLE I.

Section 1. Rates of pay in passenger service will be:

Conductors $182.00 per calendar month.
Brakemen $117.00 " " "

Eight hours to constitute a day. Overtime 1½ times *pro rata* rate. One crew to be paid for the calendar days provided they lose no time on their own account. Extra service to be paid for proportionately.

Rates of pay in freight work and mixed service will be:

Conductors, $140.00 per month.
Brakemen, 107.00 per month.

Twenty-six (26) days to constitute a month's work. Eight hours (8) to constitute a day. Overtime after eight hours at 1½ the *pro rata* rate.

The senior crew to be paid for twenty-six (26) days each month. (Overtime not to apply as part

of the month's work.) Extra crews to be paid proportionately for amount and class of service performed.

ARTICLE II.

Section 1. In all branches of the service overtime will be computed at 1½ times the *pro rata* rate. Actual time to be counted.

Section 2. Trainmen making extra trips in addition to their regular runs shall be paid extra therefor at the regular rate for the class of service performed.

Section 3. Trainmen run from terminal to terminal, or a lesser distance with an extra or special passenger or mixed train and doubling back with freight train, or *vice versa,* will be paid one passenger day and overtime for the special and in addition one freight day and overtime for the freight service. When freight cars are not handled either way, passenger pay will govern. When freight cars are handled, time for return trip is to commence 30 minutes after arrival at turning point unless leaving time is earlier.

Section 4. When necessary to run pilots, trainmen shall be employed as such and will receive freight conductors' pay.

Section 5. Trainmen deadheading at the request of the company [16] will be paid full time at the regular rate applicable to the service in which they are regularly employed. When changed off between terminals from one crew to another at Company's convenience shall be paid not less than two days' overtime, if same is obtained.

Section 6. Trainmen on court duty for the Company will be paid for full time lost, and will be allowed their necessary expenses while away from home, same to be certified to by the Attorney for the Company. Trainmen shall receive not less than one day's pay and the necessary expenses for each twenty-four (24) hours serving on court duty.

Section 7. Trainmen who are called and whose services are not wanted, and are held on duty four hours or less, shall be paid one-half day's pay. If held on duty more than four hours and not over eight hours, they shall receive one day's pay. If held over eight hours, they will be paid therefor at regular overtime rates.

Section 8. Trainmen retired from service on account of insubordination or sickness will be paid for the actual time worked. Trainmen called to relieve those retired on account of insubordination or sickness shall be paid one day's pay and evertime if same is earned by other members of the crew.

Section 9. When time slips turned in by trainmen are not allowed they shall be so notified and same immediately returned for correction, and full explanation will be given why same are not allowed.

Section 10. When crews are required to accompany specials or for any other purpose leave the home line or divisions in charge of, or with a train, they shall receive actual time made as per Article I, Section 1, and the sum of $2.50 per day for expenses.

Section 11. Trainmen required to go to the S. P. or E. P. & S. W. yard to receive or deliver cars shall

be paid not less than three hours and overtime, if overtime is obtained. Time for making such trips not to be deducted from road day.

ARTICLE III.

Section 1. Time of trainmen to begin at time required to report for duty until relieved at destination. Time to be allowed date train leaves terminal. If held in yard for any cause, they will be allowed actual minutes, initial overtime, to be figured at overtime rates. Road crews will not be required to do any switching in Clifton yards, and if required to do so, they will be allowed one day's pay and overtime, if overtime is obtained in addition to their road time. This is not to apply to switching explosives to transfer, or setting out bad order cars.

Section 2. Initial overtime is to apply on first trip out, and terminal overtime *one* last trip in.

ARTICLE IV.

Section 1. The age of trainmen will date from the time of entering service of the Company as such. As vacancies occur for conductors, brakemen will be promoted according to their ability and age in the service after having passed the necessary examinations. Passenger men shall have equal rights with freight rates and *vice versa*.

Section 2. No brakeman shall be entitled to promotion to the position of conductor, unless he has had at least one year's experience in freight train service.

Section 3. Freight conductors shall be promoted to passenger conductors according to their age in the service, except when a freight conductor is not quali-

fied to satisfactorily fill the [17] duties of the position, in which case he shall be notified of objection in writing.

Section 4. The oldest extra freight conductor shall be given preference. Vacancies of fifteen days or less, caused by regular brakemen laying off will be filled by extra man from the extra board when available, and not by men who are holding extra cars. The senior freight conductor and the brakeman may do the extra passenger and special passenger work, if they so desire.

ARTICLE V.

Section 1. Any trainman deeming he is unjustly dealt with shall have the right to a full investigation and be represented by his organization, if he so desires, and if it is decided that he has been wrongfully disciplined, he will be reinstated and paid not less than he would have received, if he had remained in the service. His appeal, however, must be made within sixty days, and he will be given a hearing within ten days of such appeal.

ARTICLE VI.

Section 1. Leave of absence will not be granted for more than ninety days, except in case of sickness, provided that after three years' continuous service trainmen will be entitled to one year leave of absence, if they so desire.

Section 2. When trainmen leave the service they will be given letters showing length of service, class of employment, and cause for leaving, provided they have been in the service thirty days or more.

ARTICLE VII.

Section 1. Trainmen after continuous service twelve hours or more shall have the right to take eight hours' rest, except in case of wrecks or washouts, provided that no crew will be tied up for rest except at terminals or to conform with the provisions of the law. The time for rest shall commence one hour and thirty minutes after time released. Trainmen to be the judge as to whether they need the rest or not. When tied up at Hachita twenty hours, or longer, they shall receive eight hours' pay.

ARTICLE VIII.

Section 1. During the summer season caboose and yard crews will be furnished ice at all terminals where it can be had.

Section 2. Crews will be allowed a reasonable time to eat at any stations where meals can be had. At terminals where meals can be had crews are required to be with trains thirty minutes before leaving time.

ARTICLE IX.

Section 1. Conductors will not be required to take out inexperienced brakemen, when acceptable experienced brakemen are available. A brakeman, having been objected to by two or more conductors in writing, for good and sufficient reasons, will be dismissed from the service.

ARTICLE X.

Section 1. Trainmen cannot be tied up between terminals except to take rest, or when they are blocked by washouts or wrecks, and when so tied up they will be allowed a minimum of eight hours'

pay to and eight hours' pay from the tying up point, and in addition thereto, twelve hours' pay for each twenty-four hours so held. Time for crews tied up on account of the law is to begin at the end of the legal rest period. Crews in road service will not be tied up for rest unless it is apparent that trip cannot be completed within the lawful time and not then until after the expiration of fourteen hours' duty, under the federal law, or within two hours of the time [18] limit provided by state laws, if state laws govern.

Section 2. Crews in work train service may be tied up at intermediate points where provisions can be had, provided that no single tie-up will be longer than twelve hours. Time to begin at the expiration of the twelfth hour.

Section 3. Clifton and Hachita are freight terminals. Clifton only is passenger terminal.

ARTICLE XI.

Section 1. Brakemen will not be required to go out on runs with less than full crews. Conductors will be held responsible for handling trains without air, until such times as they can notify the proper officials. Air hose are to be coupled and uncoupled by car inspectors at all stations where car inspectors are on duty.

ARTICLE XII.

Section 1. Train crews shall not be required to perform any duty except that of conductor or brakeman, except in emergency cases. Trainmen will not be required to shovel down coal, or oil engines.

ARTICLE XIII.

Section 1. Train crews will not be required to

load to exceed five thousand pounds of freight at any one station, nor will they be required to unload to exceed five thousand pounds out of any one car at any one place.

ARTICLE XIV.

Section 1. Trainmen shall hold jobs to which their seniority entitled them, if they so desire.

ARTICLE XV.

Section 1. In the running of double-headers thirty cars will be the maximum number of cars per train, exclusive of water car and caboose.

Signed:

_____,

For the Arizona & New Mexico Railway Company.

_____,

Committee of Brotherhood of Railway Trainmen."

That last-named proposed schedule is hereinafter referred to as Schedule "C." [19]

VIII.

That this defendant and its railway employees and in particular its conductors and brakemen were not desirous of entering into the national controversy then in progress between said National Brotherhoods of Trainmen and said Railway employers of the United States as aforesaid, and to that end and for the purpose of compromising and settling the demands of defendant's employees, and in particular of its conductors and brakemen, pending the settlement of said controversy between said National Brotherhoods of Trainmen and said Railway employers of the United States, entered into

and adopted certain schedules and contracts of employment to govern between the employees of this defendant and this defendant, among which was that certain schedule and contract of employment between this defendant and its conductors and brakemen, in words and figures as follows, to wit:

"SCHEDULE OF PAY AND REGULATIONS FOR CONDUCTORS AND BRAKEMEN OF THE ARIZONA AND NEW MEXICO RAILWAY.

The following rates of pay and regulations will govern the employment and compensation of Conductors and Brakemen in the service of THE ARIZONA AND NEW MEXICO RAILWAY COMPANY and will be in effect from June 16th, 1916.

No revision or abrogation of this contract or agreement will be made without at least thirty days' notice in writing. All rates of pay, rules and regulations previously in effect are null and void.

ARTICLE I.

1. Rates of pay in passenger service will be:

Conductors $210.00 per calendar month.

Brakemen $150.00 per calendar month.

Ten hours or less to constitute a day. Overtime *pro rata.*

2. Rates of pay in freight work or mixed service will be:

Conductors $169.00 per month.

Brakemen $136.50 per month.

Twenty-six days to constitute a month's work. Ten hours [20] or less to constitute a day. Overtime after ten hours *pro rata.*

ARTICLE II.

1. When road crews are required to make one or more trips to 85 Mine, one hour overtime will be allowed for time consumed up to one hour. If the service consumes over one hour, overtime will be paid for such service on a minute basis.

2. In all classes of service when road crews are required to make up trains at Hachita, for time consumed up to one hour, one hour initial terminal overtime will be allowed. Time consumed over one hour will be paid for as initial overtime on a minute basis.

3. It is understood that time allowed for 85 Spur and terminal or initial overtime is not to be deducted from time on duty.

4. When the business of the Arizona and New Mexico Railway per month amounts to 30,000 tons revenue freight hauled, three crews will be considered regular and will be guaranteed twenty-six days per month overtime not to be counted in guarantee. The company reserves the right to reduce the number of crews at any time when there is not enough business to justify the foregoing guarantee.

5. In all branches of the service, overtime will be computed *pro rata,* actual minutes to be counted.

6. Trainmen making extra trips in addition to their regular runs shall be paid extra therefor at the regular rate for the class of service performed.

7. Trainmen run from terminal to terminal or a lesser distance with an extra or special passenger or mixed train and doubling back with freight train or *vice versa,* will be paid one passenger day

and overtime for the special and in addition one freight day and overtime for the freight service. When freight cars are not handled either way, passenger pay will govern. When freight cars are handled, time for return trip is to commence thirty minutes after arrival at turning point unless leaving time is earlier.

8. When a freight train makes a Lordsburg turn, trainmen will not be required to make more than one trip up the hill [21] south of Clifton or north of Guthrie, unless in case of urgent necessity, and, in the event that more than one trip will have to be made, constructive overtime will be allowed for each extra trip. On through trips from terminal to terminal, trainmen will not be required to double hill south of Clifton or to make more trips than a double north of Guthrie.

9. When necessary to run pilots, trainmen shall be employed as such and will receive freight conductor's pay.

10. Trainmen deadheading at the request of the company will be paid one day at the regular rate applicable to the service in which they are regularly employed. When changed off between terminals, from one crew to another at the company's convenience, they shall be paid not less than two days and overtime if same is obtained.

11. Trainmen on court duty for the company will be paid for full time lost, and will be allowed their necessary expenses while away from home, same to be certified by the attorney for the company. Trainmen will receive not less than one day's pay

and the necessary expenses for each twenty-four hours serving on court duty.

12. Trainmen who are called and whose services are not wanted, and are held on duty five hours or less, shall be paid one-half day's pay. If held on duty more than five hours and not over ten hours, they shall receive one day's pay. If held over ten hours, they will be paid therefor at regular overtime rates.

13. Trainmen retired from service on account of insubordination or sickness will be paid for the actual time worked. Trainmen called to relieve those retired on account of insubordination or sickness will be paid one day's pay and overtime if same is earned by other members of the crew.

14. When time slips turned in by the trainmen are not allowed, they shall be so notified and same immediately returned for correction. Full explanation will be given why same are not allowed.

15. When crews are required to accompany specials or for any other purpose leave the home line or division in charge of, or with, a train, they shall receive actual time made as [22] per Article I, paragraph 1, and the sum of $2.50 per day for expenses.

16. Trainmen will not be required to go to the Southern Pacific or El Paso and Southwestern yards to receive or deliver cars except for perishable freight or live stock.

ARTICLE III.

1. Time of trainmen is to begin at time required to report for duty and will end when relieved at destination. Time to be allowed date trains leave ter-

minal. If freight crews are held in yard after time set to depart for any cause, they will be allowed actual minutes initial overtime, to be figured at overtime rates. Road crews will not be required to do any switching in Clifton Yard. This is not to apply to switching explosives to transfer, or setting out bad order cars not to tramp crews.

2. Initial overtime is to apply to first trip out and terminal overtime to last trip in.

ARTICLE IV.

1. The age of trainmen will date from the time of entering service of the company as such. As vacancies occur for conductors, brakemen will be promoted according to their ability, and age in the service, after having passed the necessary examination. Passenger men shall have equal rights with freight men and *vice versa.*

2. No brakeman shall be entitled to promotion to the position of conductor unless he has had at least one year's experience in freight train service.

3. Freight conductors shall be promoted to passenger conductors according to their age in the service, except when a freight conductor is not satisfactorily qualified to fill the duties of the position, in which case he shall be notified of objection in writing.

4. The oldest extra freight conductor shall be given preference. Vacancies of fifteen days or less caused by regular brakemen laying off will be filled by extra men from the extra board when available, and not by men who are holding extra cards. The senior freight conductor and brakemen may do the

extra passenger and special passenger work, if they so desire. [23]

ARTICLE V.

Any trainman deeming he is unjustly dealt with shall have the right to a full investigation and be represented by his organization, if he so desires, and, if it is decided that he has been wrongfully disciplined, he will be reinstated and paid not less than he would have received if he had remained in the service. His request for an investigation, however, must be made within sixty days, and he will be given a hearing within ten days of such request.

ARTICLE VI.

1. Leave of absence will not be granted for more than ninety days, except in cases of sickness; provided, that after three years' continuous service, trainmen will be entitled to one year's leave of absence, if they so desire.

2. When trainmen leave the service, they will be given letters showing length of service, class of employment and cause for leaving, provided they have been in the service thirty days or more.

ARTICLE VII.

Trainmen, after continuous service of twelve hours or more, shall have the right to take eight hours' rest, except in case of wrecks, or washouts; provided, that no crew shall be tied up for rest except at terminals or to conform with the provisions of the law. The time for rest shall commence one hour and thirty minutes after the time released. Trainmen to be the judges as to whether they need the rest or not. When tied up at Hachita twenty

hours or longer, they shall receive ten hours pay for each twenty-four hours so held.

ARTICLE VIII.

1. During the summer season cabooses and yard crews will be furnished ice at all terminals where it can be had.

2. Crews will be allowed a reasonable time to eat at any station where meals can be had. With the exception of Hachita, at terminals where meals can be had, crews are required to be with trains thirty minutes before leaving time.

ARTICLE IX.

Conductors will not be required to take out inexperienced brakemen when acceptable experienced brakemen are available. [24] A brakeman, having been objected to by two or more conductors in writing, for good and sufficient reasons, will be dismissed from the service.

ARTICLE X.

1. Trainmen cannot be tied up between terminals except to take rest, or when they are blocked by washouts and wrecks, and when so tied up, they will be allowed a minimum of ten hours' pay to and ten hours' pay from tying up point; and in addition thereto, twelve hours' pay for each twenty-four hours so held. Time for crews tied up account of the law is to begin at the end of the legal rest period. Crews in road service will not be tied up for rest unless it is apparent that trip cannot be completed within the lawful time and then not until after the expiration of fourteen hours' duty under the Federal Law, or within two hours of the time limit

provided by State Laws, if State Laws govern.

2. Crews in work train service may be tied up at intermediate points where provisions can be had, provided that no single tie-up will be longer than fourteen hours. Time to begin at the expiration of the fourteenth hour.

3. Clifton and Hachita are freight terminals. Clifton only is passenger terminal.

ARTICLE XI.

All freight train crews will consist of a conductor and three brakemen. Brakemen will not be required to go out on runs with less than full crews. Conductors will be held responsible for handling trains without air until such times as they can notify the proper officials. Air hose to be coupled and uncoupled by car inspectors at all stations where car inspectors are on duty.

ARTICLE XII.

Train crews shall not be required to perform any duty except that of conductors and brakemen, except in emergency cases. Trainmen will not be required to shovel down coal or oil engines.

ARTICLE XIII.

Train crews will not be required to load to exceed [25] five thousand pounds of freight at any one station, nor will they be required to unload to exceed five thousand pounds out of any one car at any one place.

ARTICLE XIV.

Trainmen shall hold jobs to which their seniority entitles them, if they so desire.

ARTICLE XV.

In the running of double-headers, thirty cars will be the maximum number of cars per train, exclusive of water cars and cabooses.

Signed:
P. REISINGER,
For the A. & N. M. Ry. Co.,
J. M. KLINE,
W. E. MITCHELL,
I. C. CONNER,
For the B. of R. T.

Approved:
NORMAN CARMICHAEL,
General Manager."

The last-named schedule and contract of employment is hereinafter referred to as Schedule "D."

IX.

That at the time of the formation and adoption of said Schedule "D," effective June 16, 1916, it was appreciated by this company and its trainmen that the question of the national adoption on the part of the railroad brotherhoods of trainmen and the railway employees of the United States of an 8-hour day and time and one-half overtime basis for wages, was not settled, and that the matter was then an open question likely to be determined either by adoption or by rejection or by compromise and that inasmuch as the trainmen and employees of this defendant company, are and then were members of and affiliated with said National Brotherhood of Trainmen, in the event the 8-hour day and time and one-half overtime basis of wage schedule was either

adopted or a compromise effected thereon, a further adjustment of wages would be necessary between this defendant and its trainmen upon said schedule "D," in conformity with the conclusion and agreement if reached between the said National Brotherhoods of Trainmen and said railway [26] employers of the United States. Recognizing this contingency an express written agreement was executed between this company and its trainmen, in words and figures as follows, to wit:

"AGREEMENT BETWEEN THE TRAIN AND ENGINE MEN OF THE ARIZONA AND NEW MEXICO RAILWAY COMPANY AND THE ENGINE MEN OF THE CORONADO RAILROAD.

In signing up the agreement between the Train and Engine men which is effective under date of June 16, 1916, it is mutually agreed between the parties to this agreement namely: The Arizona & New Mexico Railway Company, The Coronado Railroad, the Engine men of the Coronado Railroad and the Train and Engine Employees of The Arizona & New Mexico Railway, that in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for overtime, or both of these provisions, that the new Schedule under date of June 16th, 1916, will not be used as a basis on which to figure out rates of pay or working conditions, and that for the purpose of figuring a schedule under such eight-hour day or time and one-half for overtime, this schedule of

June 16th, 1916, will not be considered as having been in effect.

(Signed) THEO. M. KLINE,
For the Engineers.
(Signed) FRANK THOMAS,
For the Firemen.
(Signed) W. E. MITCHELL,
For the Trainmen.
(Signed) P. REISINGER,
For the Arizona and New Mexico Ry. and the Coronado Railroad.

Clifton, Arizona, July 7th, Nineteen Sixteen."

That the last-mentioned agreement is hereinafter referred to as schedule "E." [27]

XI.

That the agreement between the train and engine men effective under date of June 16, 1916, mentioned and referred to in said schedule "E" is the agreement set forth and contained in said schedule "D."

XII.

That the aforesaid agreements, excepting in so far as one may be affected by the others, were in full force and effect at the time the Adamson Act became effective.

XIII.

That plaintiff entered the employ of this defendant as trainman and brakeman on the 6th day of August, 1916, and continued in such employment to and until the 27th day of April, 1917.

XIV.

That from said 6th day of August, 1916, to and including the 31st day of December, 1916, plaintiff

was paid and receipted in full for all services by him performed as such trainman and brakeman for defendant as provided by and under the provisions of said schedule "D."

XIV.

That subsequent to the passage of the Adamson Act the train employees of defendant, including plaintiff, insisted on schedule "D" being so changed as to apply to such schedule the eight-hour provisions of such Adamson Act, and that they be paid by such schedule "D" on an eight-hour basis, with overtime in excess of eight hours at the same rate, but that defendant declined so to do and thereafter paid such employees, including plaintiff, for such train service compensation computed on the basis of an application of the Adamson Act and its provisions to the compensation provided in schedule "A" except in cases where by using the provisions of schedule "D" without applying the Adamson Act, a greater compensation would result to such employees, including plaintiff, in which cases such compensation was computed and payments made in accordance with schedule "D," without applying the Adamson Act to plaintiff and other train employees. [28]

XVI.

That from and including the first day of January, 1917, to and including the said 27th day of April, 1917, plaintiff performed the services and worked the number of hours and was paid therefor by, and received and accepted from, defendant, as follows:

Date. 1917.	Actual Hours Worked.		Extras Under Schedule "D."		Total Time Paid.		Hourly Rate.	Paid Per Day.
Jan.	Hrs. & Minutes.		Hrs. & Minutes.		Hrs. & Mints.		Cents.	$
1	10	55			10	55	52½	5.73
2	11	05	1		12	05	"	6.34
3	12				12		"	6.30
4	9	40	1	10	11	10	"	5.86
5	13	38	1		14	38	"	7.68
6	12	55	1		13	55	"	7.31
7	11	40			11	40	"	6.13
8	10	10		28	10	38	"	5.58
9	11	55	1		12	55	"	6.78
10	13	30	1		14	30	"	7.61
								[29]
11	15		1		16		52½	8.40
12	13		1		14		"	7.35
13	11	45	1		12	45	"	6.69
14	11	42	1		12	42	"	6.67
15	10	35		25	11		"	5.77
								$100.20
16	12		1		13		"	6.82
17	10	05	1		11		"	5.77
18	9	50	1		11		"	5.78
19	9	35	1		11		"	5.77
20								
21	11	40	1		12	40	"	6.65
22	9	10	1		11		"	5.78
23	10		1		11		"	5.77
24	10	30		30	11		"	5.78
25	9	45	1	10	11	10	"	5.86
26	9	50	2		12		"	6.30
27								
28	15		1		16		"	8.40
29	10	57		3	11		"	5.78
30	11	15	1		12	15	"	6.43
31	11	15			11	15	"	5.91
								$86.80

Date. 1917. Feb.	Actual Hours Worked. Hrs. & Minutes.		Extras Under Schedule "D." Hrs. & Minutes.		Total Time Paid. Hrs. & Mts.		Hourly Rate. Cents.	Paid Per Day. $
1	11	30	1		12	30	"	6.56
2	9	22	1		11		"	5.78
3	12	55			12	55	"	6.78
4	11	17	1		12	17	"	6.45
5	10		1		11		"	5.78
6	12	55	1		13	55	"	7.31
7	10	53		22	11	15	"	5.91
8	9	30		30	10		"	5.25
9	10	45			10	45	"	5.64
10								
11	11	05	1		12	05	"	6.34
12	9	20	1		11		"	5.77
13	9	55	1		11		"	5.78
14	8	25	1		11		"	5.77
15	9	20	1		11		"	5.78
								$84.90
								[30]
16	9	12	1		11		52½	5.78
17								
18	12	05	1		13	05	"	6.87
19	11	50			11	50	"	6.21
20	10		1		11		"	5.78
21	8		1		11		"	5.78
22	12	50	1		13	50	"	7.26
23	8	25	1		11		"	5.78
24								
25	11	10	1		12	10	"	6.39
26	9	18	1		11		"	5.78
27	11	05	1		12	05	"	6.34
28	8		1		11		"	5.78
								$67.75

Date.	Actual Hours Worked.	Extras Under Schedule "D."	Total Time Paid.	Hourly Rate.	Paid Per Day.
1917. Mar. 1917.	Hrs. & Minutes.	Hrs. & Minutes.	Hrs. & Mts.	Cents.	$
Mar.					
1	10	1	11	52½	5.78
2	9 10	2	12	"	6.30
3					
4	12 25	1	13 25	"	7.04
5	10 06	54	11	"	5.78
6	9 10	1	11	"	5.77
7	8	1	11	"	5.78
8	9 30	1	11	"	5.77
9	8	1	11	"	5.78
10	10 Pas- 40		10 40	50	5.33
11	10 sen- 27	1	11 27	52½	6.01
12	9 ger 35	1	11	"	5.78
13	11 25	1	12 25	"	6.52
14	8	1	11	"	5.78
15	9 35	1	11	"	5.78
					$83.20
16	8 47	1	11	"	5.77
17	11 15	1	12 15	"	6.43
18	10 50	10	11	"	5.78
19	8 Passenger		10	50	5.00
20					
21	10 28	1 32	12	52½	6.30
22	11 15	1	12 15	"	6.43
23	9 35	1	11	"	5.77
24					
25 (	9	1	11	"	5.78
(	8		10	"	5.25
26	8	1	11	"	5.77
27	12 15	1	13 15	"	6.96
28	8	1	11	"	5.77
29	9 40	1	11	"	5.77
30	9 34	1	11	"	5.77
					$82.55

Date. 1917.	Actual Hours Worked.		Extras Under Schedule "D."		Total Time Paid.		Hourly Rate.	Paid Per Day.
April.	Hrs. &	Minutes.	Hrs. &	Minutes.	Hrs. &	Mts.	Cents.	$
1	9	35	1	5	11	5	52½	5.82
2	10	51		9	11		"	5.78
3	9	55	1		11		"	5.78
4	8	31	1		11		"	5.78
5	9	15	1		11		"	5.78
6	8		1		11		"	5.78
7								
8	9	35	1		11		"	5.77
9	9	37	1		11		"	5.78
10	8	35			10		"	5.25
11	8	50	1		11		"	5.77
12	8				10		"	5.25
13	8		1		11		"	5.78
14								
15	11	53	1	02	12	55	"	6.78
								$75.10
16	8	57	1		11		"	5.78
17	10	20	1		11	20	"	5.95
18	8	40	1		11		"	5.77
19	10	15	1		11	15	"	5.91
20	8		1		11		"	5.78
21								
22	10	20	1		11	20	"	5.95
23	9	35	1		11		"	5.78
24	9	55	1	20	11	20	"	5.95
25	8		1		11		"	5.78
26	12		1		13		"	6.83
27	9	25	1		11		"	5.77
							Grand Total.....	$645.75

RECAPITULATION OF ABOVE STATEMENT:

Earned and paid under Schedule "A" with Adamson Act applied thereto:

As Freight Brakeman 1075–36/60 hrs. at 52½ per hr.	$564.72
As Passenger Brakeman 18–40/60 hrs. at 47.175¢ per hr.	8.80
Total	$573.52
Paid in addition under Schedule "D" as provided in paragraph 15 herein the sum of	72.23
Grand Total	$645.75

[32]

XVII.

That if under the facts above stated, it was the duty of defendant to pay plaintiff under schedule "A" with Adamson Act applied thereto, defendant would have earned and have been entitled to receive for such services as follows:

As Freight Brakeman 1075–35/60 hrs. at 52½¢ per hr.	$564.72
As Passenger Brakeman 18–40/60 hrs. at 47.175 per hr.	8.80
Total	$573.52

XVIII.

That if under the facts above stated it was the duty of defendant to pay plaintiff under schedule "D," with Adamson Act applied thereto, plaintiff

would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1075–36/60 hrs. at 65.625¢ per hr	$705.85
As Passenger Brakeman 18–40/60 hrs. at 62.5 per hr	11.67
Total	$717.52

XIX.

That if under the facts above stated it was the duty of defendant to pay plaintiff under schedule "D," plaintiff would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1210–12/60 hrs. at 52.5¢ per hr	$635.40
As Pass'gr Brakeman 20–40/60 hrs. at 50 cents per hr	10.35
Total	$645.75

Respectfully submitted,

L. KEARNEY,

Attorney for Plaintiff.

H. A. ELLIOTT,

Attorney for Defendant. [33]

[Endorsed]: In the United States District Court in and for the District of Arizona. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Agreed Statement of Facts. Filed this 6th day of February, 1920. C. R. McFall, Clerk. L. Kearney, Attorney for Plaintiff, Clifton, Arizona. H. A. Elliott, Attorney for Defendant, Clifton, Arizona. [34]

In the District Court of the United States for the District of Arizona.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Judgment.

This action came on regularly for trial on the 21st day of February, 1920, the plaintiff being represented by his attorney, L. Kearney, Esq., and the defendant being represented by its attorney, H. A. Elliott, Esq., said matter was argued and submitted to the Court sitting without a jury, a jury having been waived in the premises, and the Court being now fully advised in the premises renders judgment for the plaintiff and against the defendant in accordance with the prayer of said complaint.

Now, therefore, by reason of the law and the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED, that the plaintiff, H. E. Foley, do have and recover of and from the defendant, The Arizona & New Mexico Railway Company, a corporation, the sum of One Hundred Fifty and no/100 Dollars (150.00), with interest thereon at the rate of six per centum per annum until paid; together with the plaintiff's costs and disbursements incurred in this action; amounting to the sum of Thirty and no/100 Dollars (30.00) with like

6% interest thereon, until paid, and for the collection of this judgment let execution issue.

Judgment rendered and entered, July 6, 1920.

[Endorsed]: Judgment. Filed July 22, 1920. C. R. McFall, Clerk. [35]

In the United States District Court in and for the District of Arizona.

L.–110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Opinion.

L. KEARNEY, for Plaintiff,

H. A. ELLIOTT, for Defendant.

FARRINGTON, District Judge (Specially Assigned):

The defendant is an Arizona corporation tion engaged in operating a railroad one hundred and eleven miles in length, running from Clifton, Arizona, to Lordsburg, New Mexico. Plaintiff was a brakeman in its employ from August 6, 1916, to April 27, 1917, and during all that time was a member of the Brotherhood of Railroad Trainmen. When he entered the service of the company he

worked under a schedule and contract of employment which became effective June, 1916, and continued to be so until January of the following year. During and prior to this time negotiations were pending between the railroad employers of the United States and the National Brotherhoods of Trainmen, which finally culminated in what is popularly known as the Adamson Act. Pending this controversy, in order to avoid entering into it, and for the purpose of temporarily adjusting wage difficulties, defendant and its employees entered into a schedule and contract of employment, herein designated as Exhibit "D," which, among other things, provided:

"1. Rates of pay in passenger service will be:

Conductors $210.00 per calendar month.

Brakemen $150.00 per calendar month.

Ten hours or less to constitute a day. [36]

Overtime *per rata.*

2. Rates of pay in freight work or mixed service will be:

Conductors $169.00 per month.

Brakemen $136.50 per month.

Twenty-six days to constitute a month's work. Ten hours or less to constitute a day. Overtime after ten hours *pro rata.*"

Appreciating the fact that the controversy between the Railroad Brotherhoods and the railway employers of the United States related to the national adoption of an eight-hour day, and time and one-half overtime basis for wages, and that in the event of the adoption of such a schedule, a further

adjustment of wages would be necessary, the defendant company and its employees entered into a written agreement, dated July 17, 1916, which is designated Schedule "E," and in part is as follows:

"That in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for overtime, or both of these provisions, that the new schedule under date of June 16th, 1916, will not be used as a basis on which to figure out rates of pay or working conditions, and that for the purpose of figuring a schedule under such eight-hour day or time and one-half for overtime, this schedule of June 16th, 1916, will not be considered as having been in effect."

Subsequent to the passage of the Adamson Act the train employees of defendant, including plaintiff, insisted on Schedule "D" being so changed as to apply to such schedule the eight-hour provisions of the Adamson Act, and that they be paid by such Schedule "D" on an eight-hour basis, with overtime in excess of eight hours at the same rate, but that defendant declined so to do, and thereafter paid such employees, including plaintiff, for such train service compensation computed on the basis of an application of the Adamson Act and its provisions to the compensation provided in a schedule of wages designated as Schedule "A," which was in force and effect between April 11, 1911, and June 7, 1916.

From January 1st, 1917, to and including April 27th, 1917, Foley earned and was paid under sched-

ule "A" with the [37] Adamson Act applied thereto.

As Freight Brakeman, 1075–35/60 hrs. at 52½¢ per hr. $564.72

As Passenger Brakeman 18–40/60 hrs. at 47.175¢ per hr. 8.80

Total $573.52

Paid in addition under schedule "D" as provided in paragraph 15 herein the sum of ..... $ 72.23

Grand Total $645.75

Under schedule "D," without applying the Adamson Act, Foley would have earned and would have been entitled to receive for the same service:

As Freight Brakeman 1210–12/60 hrs. at 52.5¢ per hr. $635.40

As Passenger Brakeman 20–40/60 hrs. at 50 cents per hr. 10.35

Total $645.75

Plaintiff contends that it was defendant's duty to pay him under schedule "D" with the Adamson Act applied, wages as follows:

As Freight Brakeman 1075–35/60 hrs. at 65.625¢ per hr. $705.85

As Pass'gr Brakeman 18–40/60 hrs. at 62.5¢ per hr. 11.67

Total $717.52

The Adamson Act (39 St. at L., p. 721) establishes an eight-hour day standard for work and wages for certain employers or carriers engaged in interstate commerce on railroads exceeding one hundred miles in length; and it further provides:

"Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the prorate for such standard eight-hour workday."

Section 2 of the same statute provides for the appointment of a commission, and requires it to report its findings as to the operation and effect of the eight-hour standard workday for a period of not less than six months. Consequently, under the statute there would be no reduction of wages below the then standard for at least seven months after January 1st, 1917. The wages in dispute are claimed for services rendered [38] between January 1, 1917, and April 27th, of the same year.

The Adamson Act was approved September 3d and 5th, 1916. By its express terms it was made effective on and after January 1, 1917. Questions as to its constitutionality were settled by the Supreme Court in Wilson vs. New, 243 U. S. 332. The Court went upon the theory that inasmuch as the carriers and their employees could not agree upon a standard of wages, and the failure to agree was

liable to result in the entire interruption of interstate commerce to the infinite detriment of the public, it was competent for Congress under its power to regulate commerce between the States to provide by appropriate action for a standard of wages. The same decision forecloses any question here as to the power of Congress at the time of the passage of the Act to prescribe a minimum standard of wages "obligatory on both parties to be in force for a reasonable time in order that an opportunity might be afforded the contracting parties to agree upon and substitute a standard of their own."

The Act fixes eight hours as the standard workday and the measure of a day's work for the purpose of reckoning the compensation of employees engaged in operating trains of interstate carriers. There was no pretense of restricting the service to eight hours in each twenty-four. It also directs that during a minimum period of seven months after January 1st, 1917, the wages of employees for an eight-hour workday shall not be reduced below the then present standard day's wages. In other words, that for seven months at least after said date such employees must be paid for an eight-hour day as much as they were then receiving for a ten-hour day. In express terms the Act was made applicable to all employees of a certain class, which included this plaintiff. No exception was attempted to be made as to any member of the class, or as to any schedule of wages which might have been established by agreement of the parties.

At the time plaintiff entered defendant's employ,

at the time the Adamson Act was passed, and at the time it became [39] effective, Schedule "D" was in force, and it was the only schedule then effective. It was the present standard day's wage within the meaning of that term as it is used in section 3 of the act. Schedule "A" had been abandoned in June, 1916, by agreement of the parties. Schedule "D" was the only schedule or standard of wages to which, under its express terms, the Adamson Act could apply. If the Adamson Act cannot be applied to Schedule "D," it is ineffective so far as the parties to this litigation and the employees of the defendant corporation are concerned.

Conceding to Schedule "E" the full force and effect of an agreement between the immediate parties to this action, the fact still remains that Congress may pass laws impairing the obligation of contracts.

12 Corpus Juris, 987;

United States vs. United Shoe Machinery Co., 234 Fed. 127, 151;

Watson vs. St. Louis I. M. & S. Ry. Co., 169 Fed. 942, 946;

Pinney & Boyle Co. vs. Los Angeles Gas & Elec. Corp., 141 Pac. 620;

1915C, L. R. A. (N. S.) 282.

If this were not so, individuals and corporations could by contracts between themselves anticipate and defeat the effect of acts passed by Congress in the exercise of its undisputed authority to regulate interstate commerce.

Louisville & Nashville R. R. vs. Mottley, 219 U. S. 467, 484;

Portland Ry. L. & P. Co. vs. R. R. Com., 105 Pac. 709; 109 Pac. 273;

Pinney & Boyle Co. vs. Los Angeles Gas & Elec. Corp., 1915C, L. R. A. (N. S.) 282, and note.

In Louisville & Nashville R. R. vs. Mottley, *supra,* the Court quotes with approval the following language of Judge Cooley:

> "If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that [40] effect would be even plausible, much less sound and tenable."

In the legal tender cases, 12 Wall. 457, 551, Mr. Justice Stone says:

> "As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

It must be presumed that Schedule "E" was executed with full knowledge and understanding that Congress might exercise, as in the Adamson case, its authority to establish an eight-hour day for trainmen in interstate commerce, and also to pre-

scribe a minimum wage. I must therefore hold that plaintiff is justified in claiming that his wages should be fixed by application of the provisions of the Adamson Act to Schedule "D."

Let a judgment be entered in favor of the plaintiff in accordance with the prayer of the complaint. [41]

[Endorsed]: In the United States District Court, in and for the District of Arizona. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Opinion. Filed July 7, 1920. C. R. McFall, Clerk. [42]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Petition for Writ of Error (Copy).

To the Honorable WM. H. SAWTELLE, Judge of the District Court Aforesaid:

Now comes The Arizona and New Mexico Railway Company, a corporation, the defendant above named, by its attorney, and respectfully shows that

on the 6th day of July, 1920, the Court directed, and there was entered an order directing judgment to be entered in favor of plaintiff above named and against defendant above named, in accordance with the prayer of plaintiff's complaint, and that on the 22d day of July, 1920, pursuant to said order, a final judgment was entered against your petitioner, the defendant above named, and in favor of plaintiff above named, in the sum of One Hundred and Fifty ($150.00) Dollars, with interest at the rate of six per cent (6%) per annum until paid, together with plaintiff's costs and disbursements in the sum of Thirty ($30) Dollars, with like interest thereon until paid.

Your petitioner, feeling itself aggrieved by the said judgment entered as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf [43] to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of

said writ of error by the Circuit Court of Appeals.

H. A. ELLIOTT and
ERNEST W. LEWIS,
Attorneys for Petitioner in Error. [44]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Assignment of Errors (Copy).

Comes now The Arizona and New Mexico Railway Company, a corporation, by its attorneys and says:

That in the record and proceedings herein in the United States District Court for the District of Arizona, there is manifest error to the great prejudice of The Arizona and New Mexico Railway Company, a corporation, in this, to wit:

I.

That the trial court erred in rendering and entering judgment in favor of the plaintiff and against the defendant in the sum of One Hundred Fifty (150) Dollars, said sum being in excess of the sum of Seventy-one 20/100 ($71.20/100) Dollars, the

amount specified in the agreed statement of facts as the amount to which the plaintiff was entitled in the event judgment should be granted in his favor.

II.

That the trial court erred in rendering and entering judgment in favor of the plaintiff and against the defendant in the sum of One Hundred Fifty (150) Dollars, interest and costs, or at all, for the reasons:

(a) That the temporary agreement, Schedule "D," [45] set forth in the agreed statement of facts, by its very terms was not an agreement in force or effect either at the date of the passage or the effective date of the Adamson Act, being the Act of September 3 and 5, 1916, Chapter 463, entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce and for other purposes," but, upon the contrary, the agreement then and thereafter in force was that set forth in Schedule "A" in said agreed statement of facts.

(b) That the judgment of said Court proceeded upon an erroneous construction of the said Adamson Act in this, that said Act contemplated the application of the standard eight-hour day to contracts in being at the date of the passage or effective date of the said Act which, under the agreed statement of facts, is the agreement set forth in Schedule "A" therein, whereas the agreement, Schedule "D" to which the trial court applied said Act, was in fact a *modus vivendi* pending the settlement of the controversy between the Railroad

Brotherhoods and the Railway Managers throughout the United States and which controversy was determined by the passage of the said Adamson Act; all of which fully appears in the agreed statement of facts.

III.

That the Court erred in entering judgment in favor of the plaintiff and against the defendant for the reason that the defendant in paying its employees, and particularly plaintiff, on the basis of Schedule "A" with the Adamson Act applied thereto, and not upon Schedule "D," with the Adamson Act applied thereto, as was determined by the trial court to be its duty to do, did not thereby reduce the compensation of plaintiff below the standard day's wage in effect either at the passage of the Adamson Act or its effective date and that the standard day's wage in effect at passage or on effective date of said Adamson Act was that provided by said Schedule "A."

IV.

That the Court erred in rendering judgment in [46] favor of the plaintiff and against the defendant for the reason that the Adamson Act contemplates the enforcement of its provisions by penalty and affords no civil right of action to the employee for failure to comply therewith.

WHEREFORE, by reason of the errors aforesaid The Arizona and New Mexico Railway Company prays that the judgment rendered and entered in this action be voided, annulled and reversed and that said District Court of the United

States for the District of Arizona be directed to grant a new trial of said cause.

H. A. ELLIOTT,
ERNEST W. LEWIS,
Attorneys for Defendant. [47]

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Petition and Assignment of Errors. Filed January 22, 1921. C. R. McFall, Clerk. [48]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of H. A. Elliott and Ernest W. Lewis, attorneys for defendant, and upon filing a petition for a writ of error and assignment of errors,—

IT IS ORDERED that a writ of error be, and hereby is, allowed to have reviewed in the United

States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, upon said defendant filing herein a bond in the sum of Five Hundred ($500.00) Dollars conditioned that if the said defendant shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good then the obligation thereof to be void; else to remain in full force and virtue.

Dated this 22d day of January, A. D. 1921.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Order Allowing Writ and Fixing Bond. Filed January 22, 1921. C. R. McFall, Clerk. [49]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Chas. F. Solomon and H. H. Holbert, as sureties, are held and firmly bound unto H. E. Foley, the plaintiff above named, in the full and

just sum of Five Hundred ($500.00) Dollars, to be paid to the said H. E. Foley, his attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this the 22d day of January, A. D. 1921.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Arizona, sitting at Tucson in said District in a suit pending in said court between the said H. E. Foley as plaintiff, and The Arizona and New Mexico Railway Company, a corporation, as defendant, Cause No. 110 on the Law Docket of said court, final judgment was rendered against the said The Arizona and New Mexico Railway Company for the sum of One Hundred Fifty (150) Dollars; and the said The Arizona and New Mexico Railway Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said H. E. Foley, defendant [50] in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, according to law within thirty days from the date hereof.

NOW, the condition of the above obligation is such that if said The Arizona and New Mexico Railway Company shall prosecute its writ of error

to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY.
By LEWIS & ELLIOTT,
By H. A. ELLIOTT,
Its General Attorneys.

Sureties:

CHAS. F. SOLOMON.
H. H. HOLBERT.

Approved this the 22d day of January, A. D. 1921.

WM. H. SAWTELLE,
Judge.

Witness as to sureties:
[Notarial Seal] J. M. BAER,
Notary Public.

My commission expires August 24, 1924.

[Endorsed]: Bond. Filed January 22, 1921. C. R. McFall, Clerk. [51]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,
Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States, to the Honorable Judge of the United States for the District of Arizona, Tucson Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between The Arizona and New Mexico Railway Company, a corporation, plaintiff in error, and H. E. Foley, defendant in error, a manifest error has happened to the damage of The Arizona and New Mexico Railway Company, plaintiff in error, as by said Complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and [52] proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 22d day of January, A. D. 1921.

[Seal] C. R. McFALL,
Clerk of the United States District Court for the District of Arizona, Tucson Division.

Allowed this the 22d day of January, A. D. 1921.

WM. H. SAWTELLE,
United States Judge. [53]

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson, Arizona. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Writ of Error. Filed January 22, 1921. C. R. McFall, Clerk. [54]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Citation on Writ of Error (Copy).

United States of America,
State of Arizona,—ss.

To H. E. Foley, Plaintiff Above Named, GREETING:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, on the 21st day of February, 1921, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein the Arizona and New Mexico Railway Company, a corporation, is plaintiff in error, and H. E. Foley is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 22d day of January, A. D. 1921.

[Seal] WM. H. SAWTELLE,
United States District Judge for the District of Arizona. [55]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Tucson, Arizona, January 22, 1921, and executed the same on January 22, 1921, by reading the writ over the telephone

to L. Kearney, attorney for the plaintiff at Clifton, Arizona.

Mr. Kearney also accepted service of the same by telephone.

J. P. DILLON,
United States Marshal.
By F. G. Hudson,
Deputy.

SUPPLEMENTAL RETURN OF U. S. MARSHAL.

I further executed this writ January 28, 1921, at Clifton, Greenlee County, Arizona, by delivering to L. Kearney, personally, a true copy of the same, to which was attached a copy of "Citation on Writ of Error," a copy of "Bond," and copy of "Assignment of Errors."

This service was made upon L. Kearney by direction of Hon. E. W. Lewis, counsel for defendant.

J. P. DILLON,
United States Marshal.
By Harvey T. Grady,
Deputy.

[Endorsed]: Citation on Writ of Error. Filed Feb. 1, 1921. C. R. McCall, Clerk. By D. H. McFarland, Deputy Clerk. [56]

In the District Court of the United States for the District of Arizona.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the District Court of the United States, for the District of Arizona:

You are hereby requested to prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the writ of error issued in said cause and to incorporate into such transcript the portions of the record indicated below, to wit:

(1) Plaintiff's complaint.
(2) Defendant's demurrer and answer.
(3) Agreed statement of facts. [57]
(4) Judgment filed July 22, 1920, by the clerk of court.
(5) Petition for writ of error.
(6) Assignment of errors.
(7) Order allowing writ of error.
(8) Bond on writ of error.
(9) Writ of error.

(10) Citation on writ of error.

(11) This praecipe.

You are also hereby requested to annex to said transcript, and transmit therewith to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the original writ of error, the original assignment of errors, and the original citation, together with the acknowledgment or return of service annexed thereto.

Dated this 8th day of February, 1921.

H. A. ELLIOTT,
ERNEST W. LEWIS,
Attorneys for Defendants.

Service of the foregoing praecipe is hereby acknowledged this ——— day of ———, 1921.

———————,
Attorney for Plaintiff. [58]

———

In the District Court of the United States for the District of Arizona.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Affidavit of Service of Praecipe of Record.

State of Arizona,
County of Greenlee,—ss.

Dave W. Ling, being first duly sworn, upon his oath deposes and says:

I.

That he is a resident of Clifton, County of Greenlee and State of Arizona, and citizen of the United States, over the age of twenty-one years.

II.

That on the 11th day of February, 1921, at the hour of five o'clock P. M., affiant served the hereunto attached praecipe upon L. Kearney, attorney for defendant H. E. Foley, herein, by placing a true and correct copy of said praecipe under the front door of the office and residence of the said L. Kearney, at the town of Clifton, said county and state; that affiant found no person in charge of said office and residence at such time who would receive said paper, and was unable to gain admittance to said office and residence; that affiant was reliably informed and *and* believes the fact to be, that the said L. Kearney was at said time in the State of California. Further dependent saith not.

DAVE W. LING.

Subscribed and sworn to before me this 12th day of February, 1921.

[Notarial Seal] A. A. ANDERSON,
Notary Public.

My commission expires January 14, 1923. [59]

[Endorsed]: Praecipe. Filed Feb. 17, 1921. C. R. McFall, Clerk. By D. H. McFarland, Deputy Clerk. [60]

Letter.

L. KEARNEY,

Attorney at Law,

Clifton, Arizona.

January 25, 1921.

Hon. Clerk U. S. Dist. Court,

Dist. of Ariz.

Dear Sir:

Am informed that case of H. E. Foley vs. The Arizona & New Mexico Railway Company is about to be, or has been, appealed to Circuit Court of Appeals, in that case, the Hon. Edward S. Farrington filed therein his opinion when he decided that case. I would very much like to have a copy of that opinion go up with the other papers in the case.

Oblige,

Yours very truly,

L. KEARNEY. [61]

In the District Court of the United States, for the District of Arizona.

L.–110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFALL, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a corporation, Defendant, said case being L.–110 on the docket of said court.

I further certify that the foregoing 61 pages, numbered from 1 to 61, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, the original assignment of errors and the original citation issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Twenty-four & 60/100 Dollars ($24.60), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court this 18th [62] day of February, A. D. 1921.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona. [63]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Arizona, Tucson Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The Arizona and New Mexico Railway Company, a corporation, plaintiff in error, and H. E. Foley, defendant in error, a manifest error has happened to the damage of The Arizona and New Mexico Railway Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and [64] proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 22d day of January, A. D. 1921.

[Seal] C. R. McFALL,

Clerk of the United States District Court for the District of Arizona, Tucson Division.

Allowed this the 22d day of January, A. D. 1921.

WM. H. SAWTELLE,
United States Judge. [65]

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Writ of Error. Filed January 22, 1921. C. R. McFall, Clerk. [66]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Petition for Writ of Error (Original).

To the Honorable WM. H. SAWTELLE, Judge of the District Court Aforesaid:

Now comes The Arizona and New Mexico Railway Company, a corporation, the defendant above named, by its attorney, and respectfully shows that on the 6th day of July, 1920, the Court directed, and there was entered an order directing judgment to be entered in favor of plaintiff above named and against defendant above named, in accordance with

the prayer of plaintiff's complaint, and that on the 22d day of July, 1920, pursuant to said order, a final judgment was entered against your petitioner, the defendant above named, and in favor of plaintiff above named, in the sum of One Hundred and Fifty ($150.00) Dollars, with interest at the rate of six per cent (6%) per annum until paid, together with plaintiff's costs and disbursements in the sum of Thirty ($30) Dollars, with like interest thereon until paid.

Your petitioner, feeling itself aggrieved by the said judgment entered as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit [67] Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said circuit for the correction of errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

H. A. ELLIOTT and
ERNEST W. LEWIS,
Attorneys for Petitioner in Error. [68]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Assignment of Errors (Original).

Comes now The Arizona and New Mexico Railway Company, a corporation, by its attorneys, and says:

That in the record and proceedings herein in the United States District Court for the District of Arizona there is manifest error to the great prejudice of The Arizona and New Mexico Railway Company, a corporation, in this, to wit:

I.

That the trial Court erred in rendering and entering judgment in favor of the plaintiff and against the defendant in the sum of One Hundred Fifty (150) Dollars, said sum being in excess of the sum of Seventy-one 20/100 ($71.20/100) Dollars) the amount specified in the agreed statement of facts as to the amount to which the plaintiff was entitled in the event judgment should be granted in his favor.

II.

That the trial Court erred in rendering and entering judgment in favor of the plaintiff and against the defendant in the sum of One Hundred Fifty (150) Dollars, interest and costs, or at all, for the reasons:

(a) That the temporary agreement, Schedule "D," [69] set forth in the agreed statement of facts, by its very terms was not an agreement in force or effect either at the date of the passage or the effective date of the Adamson Act, being the Act of September 3 and 5, 1916, Chapter 463, entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce and for other purposes," but, upon the contrary, the agreement then and thereafter in force was that set forth in Schedule "A" in said agreed statement of facts;

(b) That the judgment of said Court proceeded upon an erroneous construction of the said Adamson Act in this, that said Act contemplated the application of the standard eight-hour day to contracts in being at the date of the passage or effective date of the said Act, which, under the agreed statement of facts, is the agreement set forth in Schedule "A" therein, whereas the agreement, Schedule "D," to which the trial Court applied said Act, was in fact a *modus vivendi* pending the settlement of the controversy between the Railroad Brotherhoods and the Railway Managers throughout the United States and which controversy was determined by the passage of the said Adamson

Act; all of which fully appears in the agreed statement of facts.

III.

That the Court erred in entering judgment in favor of the plaintiff and against the defendant for the reason that the defendant in paying its employees, and particularly plaintiff, on the basis of Schedule "A" with the Adamson Act applied thereto, and not upon Schedule "D" with the Adamson Act applied thereto, as was determined by the trial court to be its duty to do, did not thereby reduce the compensation of plaintiff below the standard day's wage in effect either at the passage of the Adamson Act or [70] its effective date and that the standard day's wage in effect at passage or on effective date of said Adamson Act was that provided by said Schedule "A."

IV.

That the Court erred in rendering judgment in favor of the plaintiff and against the defendant for the reason that the Adamson Act contemplates the enforcement of its provisions by penalty and affords no civil right of action to the employee for failure to comply therewith.

WHEREFORE, by reason of the errors aforesaid, said The Arizona and New Mexico Railway Company prays that the judgment rendered and entered in this action be voided, annulled and reversed and that said District Court of the United

States for the District of Arizona be directed to grant a new trial of said cause.

H. A. ELLIOTT,
ERNEST W. LEWIS,
Attorneys for Defendant. [71]

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Petition—Assignment of Errors. Filed January 22, 1921. C. R. McFall, Clerk. [72]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Citation on Writ of Error (Original).

United States of America,
State of Arizona,—ss.

To H. E. Foley, Plaintiff Above Named, GREETING:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court

of Appeals for the Ninth Circuit at the City of San Francisco, State of California, on the 21st day of February, 1921, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein The Arizona and New Mexico Railway Company, a corporation, is plaintiff in error and H. E. Foley is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 22d day of January, A. D. 1921.

[Seal] WM. H. SAWTELLE,
United States District Judge for the District of Arizona. [73]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Tucson, Arizona, January 22, 1921, and executed the same on January 22, 1921, by reading the writ over the telephone to L. Kearney, attorney for the plaintiff at Clifton, Arizona.

Mr. Kearney also accepted service of same by telephone.

J. P. DILLON,
United States Marshal.
By F. J. Hudson,
Deputy.

SUPPLEMENTAL RETURN OF U. S. MARSHAL.

I further executed this writ January 28, 1921, at Clifton, Greenlee County, Arizona, by delivering to L. Kearney, personally a true copy of the same, to which was attached a copy of "Citation on Writ of Error," a copy of "Bond," and a copy of "Assignment of Errors."

This service was made upon L. Kearney by direction of Hon. E. W. Lewis, counsel for defendant.

J. P. DILLON,
United States Marshal.
By Harvey T. Grady,
Deputy.

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Citation on Writ of Error. Filed Feb. 1, 1921. C. R. McFall, Clerk. D. H. McFarland, Deputy Clerk. [74]

[Endorsed]: No. 3649. United States Circuit Court of Appeals for the Ninth Circuit. The Arizona and New Mexico Railway Company, a Corporation, Plaintiff in Error, vs. H. E. Foley, Defendant in Error. Transcript of Record. Upon Writ

of Error to the United States District Court of the District of Arizona.

Filed February 21, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3649

7

United States
Circuit Court of Appeals
For the Ninth Circuit

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

H. E. FOLEY,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona

Brief Plaintiff in Error

Filed this ..... , 1921.

.....

Clerk United States Circuit Court of Appeals for the Ninth Circuit.

LEWIS & ELLIOTT,
MR. H. A. ELLIOTT of Clifton, Arizona,
MR. E. W. LEWIS of Phoenix, Arizona,

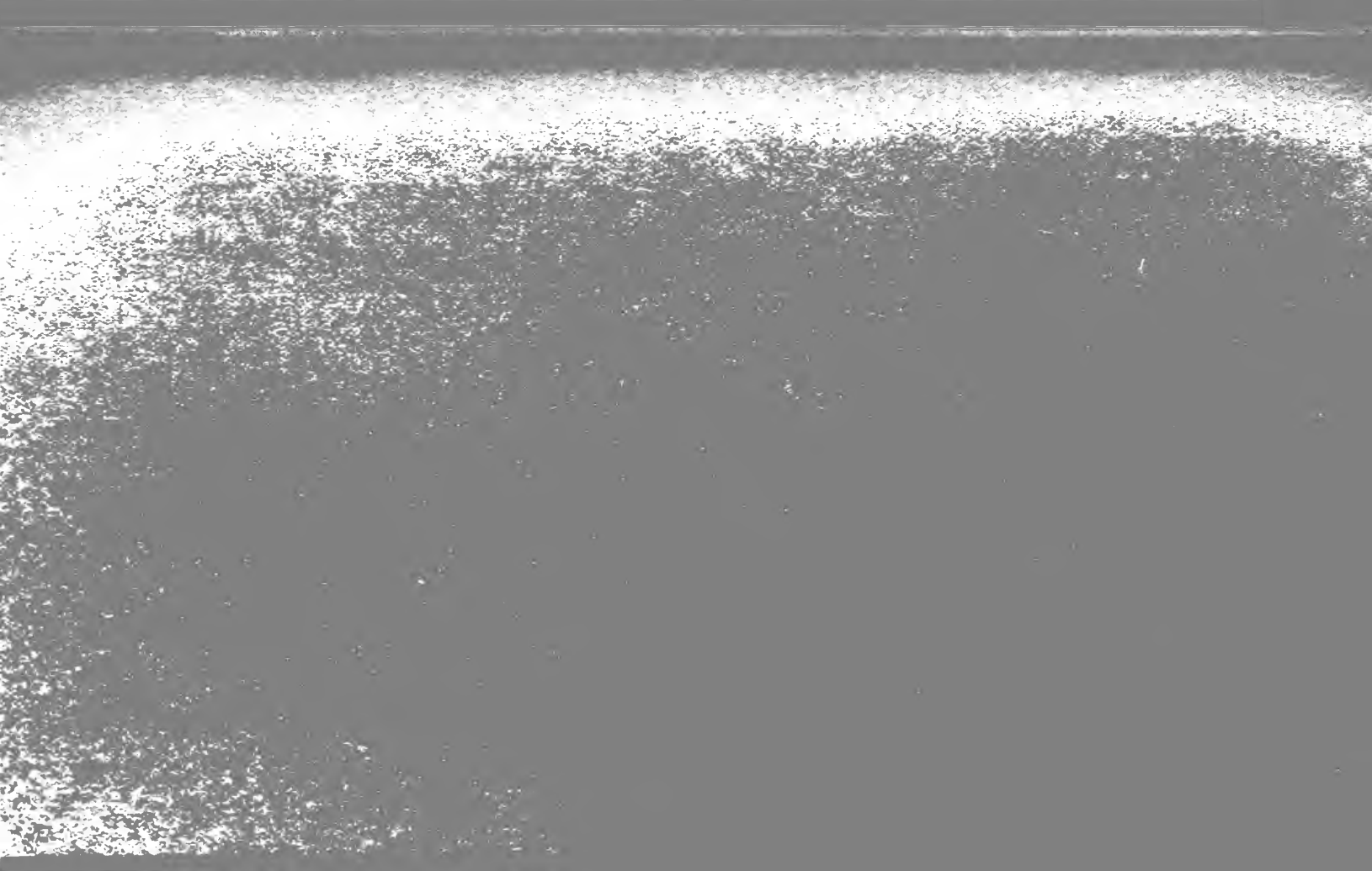
Attorneys for Plaintiff in Error.

Admit service of two copies of within Brief of Plaintiff in Error, this ..... , 1921.

.....

Attorney for Defendant in Error.

STAR JOB PRINT—TUCSON



No. 3649

United States
Circuit Court of Appeals
For the Ninth Circuit

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

H. E. FOLEY,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona

Brief Plaintiff in Error

Filed this ..... , 1921.

.....

Clerk United States Circuit Court of Appeals for the Ninth Circuit.

LEWIS & ELLIOTT,
MR. H. A. ELLIOTT of Clifton, Arizona,
MR. E. W. LEWIS of Phoenix, Arizona,

Attorneys for Plaintiff in Error.

INDEX

TABLE OF CASES CITED

No. 3649

United States
Circuit Court of Appeals
For the Ninth Circuit

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

H. E. FOLEY,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona

Brief Plaintiff in Error

STATEMENT OF CASE

This case involves the construction and application of what is commonly known as "Adamson Act", 39 Statutes at Large, page 721, approved September 3, 1916, in relation to the wage scale existing between Plaintiff in Error and Defendant in Error.

For convenience the Adamson Act is quoted in full:

"An act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: *Provided*, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in

transfers of freight between railroads or between railroads and industrial plants.

SEC. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of $25,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employees, and rent, furniture, office fixtures and supplies, books, salaries and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.

SEC. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage; and for all necessary time in excess of eight hours such employees shall be paid

at a rate not less than the pro rata rate for such standard eight-hour workday.

SEC. 4 That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both."

Defendant in error instituted this action in Justice Court, No. 1 Precinct, County of Greenlee, State of Arizona, for the recovery of wages claimed to be due by reason of the alleged failure of the Plaintiff in Error to apply properly said Adamson Act to its wage schedules. In due course, Plaintiff in Error removed the case to the United States District Court for the District of Arizona, at Tucson, Arizona, wherein the cause was submitted to the court upon an Agreed Statement of Facts. (Transcript 7-45).

Judgment was entered in favor of Defendant in Error in the lower court in the sum prayed in the complaint, One Hundred and Fifty and no—100 Dollars, with interest at six per cent per annum until paid and costs taxed at Thirty Dollars with like interest.

Plaintiff in Error owns and operates as a common carrier for hire an interstate railroad, 111.94 miles in length, between Hachita, New Mexico, and Clifton, Arizona. Defendant in error entered the employ of Plaintiff in Error the 6th day of August, 1916, and continued in such employment until the 27th day of April, 1917, and during such period was employed as a brakeman in interstate commerce.

The engineers and firemen, employees of Plaintiff in Error, were members of the Brotherhood of Loco-

motive Engineers and Firemen, and the brakemen and conductors, employees of Plaintiff in Error, were members of the Brotherhood of Railroad Trainmen at all times herein concerned, and during said period of Defendant in Error's employment he was a member of said Brotherhood of Railroad Trainmen.

Effective April 1, 1911, a schedule of wages and a contract of employment were agreed upon between Plaintiff in Error and the conductors and brakemen in the employ of Plaintiff in Error, and the Brotherhood of Trainmen, representing and binding the conductors and brakemen of Plaintiff in Error, (Transcript 9-16), referred to in said transcript as Schedule A, and hereinafter designated as Schedule A.

Plaintiff in Error and its conductors and brakemen operated under this schedule of wages from said first day of April, 1911, until the 7th day of July, 1916.

Under said Schedule "A" Brakemen were paid as follows:

PASSENGER BRAKEMEN: $117.00 per month with overtime at rate of 38 cents per hour to commence one hour after schedule (nine hours); Calender days to constitute a month. Transcript 9).

FREIGHT BRAKEMEN: 42 cents per hour; calendar working days to constitute a month; overtime after ten hours at pro rata rates. This schedule gave an average of 26 working days per month of ten hours per day, or an average of $109.20 for a ten hour day with overtime at rate of 42 cents per hour. (Transcript 10).

On March 29, 1916, the Brotherhood of Railroad Trainmen, comprising Brotherhood of Locomotive Engineers, and the Brotherhood of Trainmen, being national associations of engineers, firemen, conductors and brakemen engaged in railway service in the United States, submitted to the Railroad employers of the United States a schedule of demands in respect to wages based upon the eight-hour day and time-and-one-half overtime principle (Transcript 17-19), said demands being referred to in said transcript as Schedule B, and herein referred to as Schedule B.

Inasmuch as practically all railroads in the United States operated on the ten hour a day basis the advance in wages proposed by Schedule "B" was approximately 20 per cent, substituting the same pay for eight hours work as formerly paid for ten hours.

The locomotive engineers, firemen and trainmen of Plaintiff in Error and in particular the Defendant in Error, were at all times herein concerned, members of said Brotherhood of Railroad Trainmen.

During the month of June, 1916, at which time were then pending negotiations between railway employers of the United States and said Brotherhood of Railroad Trainmen, upon demands set forth in Schedule B, the trainmen, employees of Plaintiff in Error, submitted for the consideration of Plaintiff in Error, a proposed new wage schedule upon the eight-hour and time-and-one-half overtime basis, among which schedules and demands was one made on behalf of the conductors and brakemen of Plaintiff in Error, which said demands were tantamount

to and in conformity with said demands made by the Brotherhood of Trainmen upon the railroad employers of the United States, set forth in said Schedule B (Transcript 19-27), which said proposed schedule presented by the conductors and brakemen of Plaintiff in Error is referred to in said transcript as Schedule C, and hereinafter referred to as Schedule C.

Under said Schedule "C" brakemen were to be paid as follows:

PASSENGER BRAKEMEN: $117.00 per month. Eight hours to constitute a day; overtime one and one-half times pro rata; calendar days to constitute a month (Transcript 20).

FREIGHT AND MIXED SERVICE BRAKEMEN: $107.00 per month; 26 days to constitute a month; eight hours to constitute a day; overtime at one and one-half the pro rata rate (Transcript 20).

Under this proposed schedule the average increase in pay would have been:

PASSENGER BRAKEMEN: $3.90 per eight-hour day or 48½ cents per hour, with average overtime of two hours (to cover schedule) or average daily wage of $4.87 or average monthly wage of $146.20 as against $117.00 under Schedule "A" or an increase demand of approximately 25 per cent.

FREIGHT BRAKEMEN: $4.12 per eight-hour day or $0.515 per hour, with average overtime of two hours per day (Schedule "A" being on the ten-hour day basis) or average daily wage of $5.15 or

average monthly wage of $133.90 as against $109.20 under said Schedule "A" or an increase of approximately 22 per cent.

Plaintiff in Error and its railway employees and in particular its conductors and brakemen, were not desirous of entering into the national controversy then in progress between the National Brotherhood of Trainmen, and the railroad employers of the United States, over demands made in said Schedule B, and to that end and for the purpose of compromising and settling the demands of the employees of Plaintiff in Error, and in particular of its conductors and brakemen pending the settlement of said controversy between said National Brotherhoods of Trainmen and Railroad employers of the United States over said Schedule B, entered into and adopted new schedules and contracts of employment among which was that certain schedule and contract between Plaintiff in Error and its conductors and brakemen which was made effective the 16th day of June, 1916 (Transcript 28-36), which said new schedule and contract is referred to as Schedule D in said Transcript and hereinafter referred to as Schedule D.

Under said schedule "D" Brakemen were paid as follows:

PASSENGER BRAKEMEN: $150.00 per calender month; ten hour or less to constitute a day; over time pro rata. (Transcript 28).

This gave an average monthly increase of $3.80 over the demands contained in Schedule "C", but limited overtime after ten hours to pro rata rates;

but the increase in wages granted by this new schedule was approximately 28 per cent over the average wage under Schedule "A", being $150.00 per month as against $117.00 per month.

FREIGHT BRAKEMEN: $136.50 per month of 26 days: ten hours or less to constitute a day: overtime pro rata. (Transcript 28).

This gave an average monthly increase of $2.60 over the demands contained in schedule "C", but limited overtime after ten hours to a pro rata rate: but the increase in wages granted by this new schedule was approximately twenty-five per cent over the average wage under schedule "A", being $136.50 per month as against $109.20 per month.

It was recognized at the time of the execution of said Schedule "D", effective June 16, 1916, by both Plaintiff in Error and its trainmen, that the question of national adoption on the part of the railroad brotherhoods of trainmen and the railway employers of the United States of an eight hour day and time and one-half overtime basis for wages was not settled, and that the question was then an open one likely to be determined either by adoption or by rejection or by compromise, and inasmuch as the trainmen and employees of Plaintiff in Error were members of and affiliated with the National Brotherhood of Trainmen, in the event the eight hour day, and time and one-half overtime basis of wage schedule was either adopted or a compromise effected thereon, a further adjustment of wages would be necessary between Plaintiff in Error and its trainmen upon said Schedule "D", in conformity with the agreement so reached between said National Broth-

erhood of Trainmen and said railroad employers of the United States, and recognizing this contingency an express written agreement was executed betwee Plaintiff in Error and its trainmen in words and figures as follows, to-wit:

"AGREEMENT BETWEEN THE TRAIN AND ENGINE MEN OF THE ARIZONA AND NEW MEXICO RAILWAY COMPANY AND THE ENGINE MEN OF THE COLORADO RAILROAD.

In signing up the agreement between the Train and Engine men which is effective under date of June 16, 1916, it is mutually agreed between the parties to this agreement namely: The Arizona & New Mexico Railway Company, The Coronado Railroad, the Engine men of the Coronado Railroad and the Train and Engine Employees of The Arizona & New Mexico Railway, that in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for overtime, or both of these provisions, that the new schedule under date of June 16th, 1916, will not be used as a basis on which to figure out rates of pay or working conditions, and that for the purpose of figuring a schedule under such eight-hour day or time an one-half for overtime, this schedule of June 16th, 1916, will not be considered as having been in effect.

(Signed) THEO. M. KLINE,
For the Engineers.

(Signed) FRANK THOMAS,
For the Firemen.

(Signed) W. E. MITCHELL,
For the Trainmen.

(Signed) P. REISINGER,
For the Arizona and New Mexico Ry. and the Coronado Railway.

Clifton, Arizona, July 7th, Nineteen Sixteen."

(Transcript 37-38.) Said supplemental agreement is referred to in said Transcript as Schedule E and is hereinafter referred to as Supplemental Agreement.

The new schedule, under date June 16, 1916, referred to in said Supplemental Agreement, is the agreement herein mentioned as Schedule D.

From the 6th day of August, 1916, the date on which Defendant in Error entered the employ of Plaintiff in Error, to and including the 31st day of December, 1916, Defendant in Error was paid and receipted for in full for all services performed by him under the provisions of said Schedule D, being the new contract and schedule effective June 16, 1916.

Approved September 3, 5, 1916, the Adamson Act was passed. This act in effect provided that following the first day of January, 1917 eight hours should be deemed a day's work in railroad wage contracts, with overtime after the eight hours at pro rata rates. This act substituted the same pay for eight hours as was provided to be paid under the then existing wage schedules for the number of hours therein constituted as a day's work; or in as much as approximately all of the railroads in the United States were on the ten hour a day basis, the Act provided that the same

pay should be given for Eight Hours work as was provided by the then existing schedules to be paid for ten hours with overtime after the eight hours at pro rata rates; or the Adamson Act achieved for the railway employees affected thereby a twenty per cent increase in wages with overtime pro rata.

(Adamson Act quoted herein at page 5).

Applying the Adamson Act as contended for by Defendant in Error, that is to Schedule "D", the Average earnings of Brakemen would have been as follows:

PASSENGER BRAKEMEN: $150.00 per calender month; eight hours or less to constitute a day; overtime pro rata. On the basis of ten hours work, under this application of Adamson Act, such brakeman would have earned $6.00 per day or $180.00 per calender month, an increase of twenty per cent over Schedule "D"; an increase of $33.50 per month over and above the demands proposed in Schedule "C" or an increase of over 23 per cent ($180.00 per month as against $146.50 per month); an increase of $63.00 per month over and above the wages provided in Schedule "A", or an increase of over 53 per cent ($180.00 per month as against $117.00 per month).

FREIGHT BRAKEMEN: $136.50 per month; twenty six days to constitute a month; eight hours or less to constitute a day; over time pro rata. On the basis of ten hours work, under this application of the Adamson Act, such brakeman would have earned $6.30 per day or $163.80 per month of 26 days, an increase of 20 per cent over Schedule "D"; an increase of $30.68 per month over and above the de-

mands proposed in Schedule "C", or an increase of over 23 per cent $163.80 per month as against $133.12 per month); an increase of $54.60 per month over and above the wages provided by Schedule "A", or an increase of 50 per cent ($163.80 per month as against $109.20 per month).

Subsequent to the passage of the Adamson Act the train employees of Plaintiff in Error, including Defendant in Error, insisted that they be paid upon the basis of the application of the Adamson Act to Schedule D, the new contract and schedule adopted in July, and made effective as of June 16, 1916, and that they be paid under said Schedule D on an eight-hour basis with overtime in excess of eight hours at the same rate.

This, Plaintiff in Error declined to do and thereafter at all times paid such employees, including Defendant in Error, for all train service, compensation computed on the basis of the application of the Adamson Act to the compensation provided in Schedule A, the old schedule in effect from 1911 until June 16, 1916, except in such cases where by using the provisions of Schedule D, the new schedule and contract, effective June 16, 1916, without applying the Adamson Act, a greater compensation would result, in which cases the compensation was computed and payment made in accordance with Schedule D without applying the Adamson Act (Transcript 39).

This action of Defendant in Error was predicated in the lower Court and judgment therein found in his favor upon the theory that Schedule "D," the new or temporary and conditional sched-

ule, effective June 16th, 1916, afforded the "present standard day's wage" within the meaning of Section 3 of the Adamson Law, at the time such law became operative, and that during the control period provided in said Section 3 of the Act, Plaintiff in Error was legally required to pay Defendant in Error upon the basis of said Schedule "D" with the Adamson Law applied thereto, which is in effect, by virtue of the legislation, so to alter the provisions of said Schedule "D," that it afford the same compensation for eight hours of work as therein provided for ten hours of work, with overtime above the eight hours pro rata—an increase by virtue of such application of the legislation of twenty per cent in wages over and above the wages secured under the provisions of the schedule as previously established by the voluntary agreement of the parties as according the monetary effect of the National demands, as set forth in Schedule "B" and of the demands of the trainmen of Plaintiff in Error concomitant with such National demands, as set forth in Schedule "C."

Plaintiff in Error refused to accept this theory as its legal obligation under the facts, and contends:

First: If, under the facts, the Adamson Law was applicable to it the law was legally applicable to Schedule "A."

Second: If, under the facts, the Adamson Law was not applicable to it, the full legal duty, in respect to wages and hours of service, of Plaintiff in Error to its trainmen and in particular to Defend-

ant in Error, was discharged, during the control period named in the Act, by the observance and performance on its part of the provisions of Schedule "D."

The amounts that would have been earned by and due to Defendant in Error for the period in controversy, under the various theories of the case, herein concerned are as follows:

A.

PAYMENTS IN FACT MADE TO AND RESEIVED BY DEFENDANT IN ERROR DURING THE PERIOD IN CONTROVERSY:

Earned and paid under Schedule "A" with Adamson Act applied thereto:

As Freight Brakeman 1075–36/60 hrs. at 52½ per hr.	$564.72
As Passenger Brakeman 18–40/60 hrs. at 47.175c per hr.	8.80
Total	$573.52
Paid in addition under Schedule "D" as provided in paragraph 15 herein the sum of	72.23
Grand Total	$645.75

(Transcript 44.)

B.

SCHEDULE "A" WITH ADAMSON ACT APPLIED THERETO:

If under the facts it was the duty of Plaintiff in

Error to pay under Schedule "A" with Adamson Act applied thereto, Defendant in Error would have earned and have been entitled to receive for such services as follows:

As Freight Brakeman 1075–35/60 hrs. at 52½c per hr.	$564.72
As Passenger Brakeman 18–40/60 hrs. at 47.175 per hr.	8.80
Total	$573.52

(Transcript 44.)

C.

SCHEDULE "D" *WITH* THE ADAMSON ACT APPLIED THERETO:

If under the facts it was the duty of Plaintiff in Error to pay under Schedule "D" with Adamson Act applied thereto, Defendant in Error would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1075–36/60 hrs. at 65.625c per hr.	$705.85
As Passenger Brakeman 18–40/60 hrs. at 62.5 per hr.	11.67
Total	$717.52

(Transcript 44-45.)

SCHEDULE "D" *WITHOUT* THE ADAMSON ACT APPLIED:

If under the facts it was the duty of Plaintiff in

Error to pay under Schedule "D," Defendant in Error would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1210–12/60 hrs. at 52.5c per hr.	$635.40
As Pass'gr Brakeman 20–40/60 hrs. at 50 cents per hr.	10.35
Total	$645.75

(Transcript 45.)

SPECIFICATION OF ERRORS

I.

The trial court erred in rendering and entering judgment in favor of the Defendant in Error and against the Plaintiff in Error in the sum of One Hundred Fifty (150) Dollars, said sum being in excess of the sum of Seventy-one 20/100 ($71.20) Dollars, the amount specified in the agreed statement of facts as the amount to which the Defendant in Error was entitled in the event judgment should be granted in his favor.

II.

That the trial court erred in rendering and entering judgment in favor of Defendant in Error and against the Plaintiff in Error in the sum of One Hundred Fifty (150) Dollars, interest and costs, or at all, for the reasons:

(a) That the temporary agreement, Schedule "D," [45] set forth in the agreed statement of facts, by its very terms was not an agreement in

force or effect either at the date of the passage or the effective date of the Adamson Act, being the Act of September 3 and 5, 1916, Chapter 463, entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce and for other purposes," but, upon the contrary, the agreement then and thereafter in force was that set forth in Schedule "A" in said agreed statement of facts.

(b) That the judgment of said Court proceeded upon an erroneous construction of the said Adamson Act in this, that said Act contemplated the application of the standard eight-hour day to contracts in being at the date of the passage or effective date of the said Act which, under the agreed statement of facts, is the agreement set forth in Schedule "A" therein, whereas the agreement, Schedule "D" to which the trial court applied said Act, was in fact a *modus vivendi* pending the settlement of the controversy between the Railroad Brotherhoods and the Railway Managers throughout the United States and which controversy was determined by the passage of the said Adamson Act; all of which fully appears in the agreed statement of facts.

III.

That the Court erred in entering judgment in favor of the Defendant in Error and against Plaintiff in Error for the reason that the Plaintiff in Error in paying its employees, and particularly Defendant in Error, on the basis of Schedule "A" with the Adamson Act applied thereto, and not upon Schedule "D," with the Adamson Act applied thereto, as was determined by the trial court to be

its duty to do, did not thereby reduce the compensation of Defendant in Error below the standard day's wage in effect either at the passage of the Adamson Act or its effective date and that the standard day's wage in effect at passage or on effective date of said Adamson Act was that provided by said Schedule "A."

ARGUMENT

SPECIFICATION OF ERROR I.

The amount of the judgment is obviously erroneous upon the stipulations of the Agreed Statement of Facts.

From January 1st, 1917, to April 27th, 1917, the period in dispute, Defendant in Error was paid by Plaintiff in Error the sum of $645.75. (Transcript 39-42).

Assuming the correctness of the contention of Defendant in Error that during this period he should have been paid on the basis of the application of the Adamson Act to Schedule "D", his earnings upon this disputed theory would have been $717.52. (Transcript 45) Upon the Agreed Statement of Facts the most in any event the Defendant in Error could be entitled to is the difference between the amount paid and the amount so claimed, or the sum of $71.20.

SPECIFICATIONS OF ERRORS II AND III.

FIRST PROPOSITION

PLAINTIFF IN ERROR AND ITS TRAIN EMPLOYEES WERE NEVER PARTIES TO THE DISPUTE THAT GAVE RISE TO THE PASSAGE OF THE ADAMSON ACT; AND FOR THE EX-

PRESS PURPOSE OF AVOIDING PARTICIPATION THEREIN SETTLED BETWEEN THEMSELVES THIS DISPUTE BY SETTING UP A NEW SCHEDULE WHICH SECURED TO THE TRAIN EMPLOYEES ADVANCES IN WAGES, FIRST, TANTAMOUNT TO THE ADVANCES CONTENDED FOR AND RESISTED IN THE NATIONAL CONTROVERSY, AND SECOND, IN EXCESS OF INCREASES THAT WOULD OTHERWISE HAVE BEEN SECURED BY THE APPLICATION OF THE ADAMSON ACT, HAD PLAINTIFF IN ERROR AND ITS TRAINMEN JOINED THE NATIONAL CONTROVERSY AND WITHOUT AGREEMENT ABIDED THE RESULT OF THAT CONTROVERSY.

As fully appears from the statement of the case, when the national controversy arose between the railroad employers of the United States and the Brotherhood of Railroad Trainmen, wherein the latter were demanding that the compensation of trainmen be based upon the eight-hour and time and one-half overtime principle, Plaintiff in Error and its trainmen were operating under a schedule or contract for wages which had been in amicable existence from the year 1911 and continued so to operate until in July of 1916, when the national controversy was still in the process of negotiation. Although the train employees of Plaintiff in Error were members of brotherhoods affiliated with the Brotherhood of Railroad Trainmen and Plaintiff in Error was a railroad employer and, as such, were entitled to participate in the national controversy, neither Plaintiff in Error nor its trainmen were desirous of involving themselves in the dispute. In

conformity with the demands of the Brotherhood of Railroad Trainmen in the national controversy, the trainmen of Plaintiff in Error presented a proposed schedule and contract for wages which were tantamount to the demands made nationally, and were based upon the eight-hour and time and one-half overtime principle; and as a compromise, and as a solution of such demands so made, Plaintiff in Error and its trainmen amicably agreed to a new schedule or contract for wages (Schedule D) securing to passenger brakemen an advance of approximately 28% and to freight brakemen an advance of approximately 25% over and above the wages secured by the provisions of the then existing schedule (Schedule A). In forming the new schedule there was laid aside insistence on the application of the principle of the eight-hour day and time and one-half overtime. This was a natural conclusion for the reason that then the adoption of the eight-hour and time and one-half overtime principle nationally had not been determined, and inasmuch as the trainmen of Plaintiff in Error were affiliated with the National Brotherhood of Railroad Trainmen, they would be desirous of following on their part as affiliated members of such national brotherhood whatever final agreement it reached with the railroad employers in the United States. However, it would appear that the demands for time and one-half overtime were not entirely disregarded in the fixation of the new rates of wages inasmuch as the schedule proposed by the trainmen (Schedule C) and based upon the principle of the eight-hour day and time and one-half overtime proposed an increase for passenger brakemen of 25% over the old schedule (Schedule A) as against the increase of

28% over the old schedule granted by the new schedule (Schedule D); and for freight brakemen proposed an increase of 22% as against the granted increase in the new schedule of 25% over the old schedule, or Schedule "A."

In recognition of the eventuality that the eight-hour day and time and one-half overtime principle might be adopted nationally, and that the new schedule, made retroactively effective to the 16th day of June, 1916, was but a *modus vivendi* pending the settlement of the national controversy, Plaintiff in Error and its trainmen entered into an express written agreement, supplemental to the new schedule (Schedule "D"), quoted in the statement of the case at page 14 herein. Plainly the effect of this agreement was that in the event Plaintiff in Error and its railroad trainmen determined to base railroad compensation upon the eight-hour day and time and one-half overtime principle, the new schedule (Schedule D) should not be taken as the basis for the application of that principle, and should not be considered as having been in existence, thereby reviving the immediately pre-existing schedule, or Schedule "A." Obviously, from an examination of the national demand (Schedule B), all that was sought to be accomplished thereby was the payment, for eight hours of work, of that sum which was then paid under existing schedules and contracts for a day's work as thereby constituted with time and one-half for overtime above the eight hours; and just as obviously, the trainmen of Plaintiff in Error, although not securing an eight-hour day or time and one-half for overtime, did obtain in an actual advance of wages, on the basis of a ten-hour day and pro rata overtime, considerably

in excess of what would have been the wage increase secured by the simple application of the eight-hour day and time and one-half overtime principle to the old schedule (Schedule A) ;and just as obviously, at the time of the negotiation of the new schedule (Schedule D) it appeared equitable and just to both sides, the Plaintiff in Error and its trainmen, that, inasmuch as all the monetary advantage which would be achieved by the application of the eight-hour day and time and one-half overtime principle had been achieved without recognition of the principle, in the event the principle were recognized and to be applied, it should not be applied to the schedule or contract which already secured the monetary advantage resulting from the application of the principle; and to save any future misunderstanding, upon this point, the agreement contained in the supplemental agreement (Schedule E) was reduced to writing and executed.

Of course at the time the new schedule (Schedule D) was negotiated, and at the time the supplemental agreement was executed and the understanding, therein, expressed, had between Plaintiff in Error and its trainmen, the enactment of any such law as the Adamson Act had never been thought of, and was entirely beyond any reasonable contemplation of the parties.

What was contemplated, and within the reasonable anticipation of the paries, was the eventuality of the national adoption by agreement of the eight hour day and time and one-half overtime principle. The actual development was that the national brotherhoods and the railroad employers of the United

States were unable to agree upon the solution of the controversy involving this principle and to prevent a threatened general strike an tie-up of all the railroads in the United States concerned in the controversy and to safeguard against a disastrous, nationwide paralysis of industry, Congress enacted the Adamson Act, which recognized the eight hour, but not the time and one-half overtime principle. So, by unexpected legislation and development, as far as these parties were concerned, there was substituted for the probable and contemplated national agreement in recognition of the eight hour principle, the legislative recognition and application of such principle. In justice between these parties the Plaintiff in Error should have every benefit from the plain provision and intendment of the supplemental agreement, notwithstanding that the application of the eight hour principle came about through legislative interference rather than by contractual agreement between the parties.

Section 3 of the Adamson Act provides:

> "Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter, the compensation of railroad employees subject to this act for a standard eight hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight hour workday."

The purpose of this section was obviously twofold: first to secure to the trainmen of the United

States the application of the eight hour day; but to what? To the schedules and contracts for railroad compensation which were in effect *and out of which the controversy which gave birth to the Adamson Act arose.* Second, to afford to the Commission appointed for the purpose of investigating the effect of the act upon railroad conditions, a stable and unchanging, quiescent period in which to make such observation. But in the light of what circumstances and conditions was it the contemplation of the act this investigation by such commission should be made? Clearly, if an investigation were to be made by the commission as to the effect on railroad conditions of the application of the Adamson Act, it could be the only intendment of the act, and such investigation could be of informative value and the orientation of the data thereby secured of service in determining the advantages or disadvantages of the operation or continued operation of the Adamson Act, only in the event such investigation was had and the data thereon compiled from an application of the Adamson Act to those schedules and wage contracts then in existence between the railroad employers and the tarinmen of the United States and *out of which the controversy arose.* It was the conditions in existence, the schedules and contracts providing for railroad wages extant at the time of the presentation of the national demands in March, 1916, that gave rise to such demands and the desire on the part of the railroad trainmen to secure application of the eight hour principle, and it was in consideration of the existence of such circumstance and of such schedules and wage agreements that Congress determined to secure, temporarily at least, to these trainmen the application of this principle and

to afford opportunity to an appropriate Commission to observe the advantages or disadvantages flowing from such action. And, to insure an orderly observation of the effect of the application of the law to those conditions, Congress provided that the condition during the period of observation should not be changed. And it follows from this evident intendment and purpose of the act that it is but a reasonable further construction of the law and its intendment that it was not to be applied to any abnormal or temporary situation arisen by reason of any peculiar relation between railroad employer and employee and not of the standard conditions out of which the controversy which led to the enactment of the Adamson law arose. The law was enacted hurriedly to avoid an apparent and imminent national calamity and for the purpose of arranging and providing for a general condition and not for special conditions that might by chance be in existence and arisen individually between employers and employees and out of circumstances and conditions not at all connected with those giving rise to the necessity of the enactment of the Adamson law. There was nothing to be gained by the observance of the effect of the application of the Adamson law to the new or temporary schedule "D" between Plaintiff in Error and its trainmen, which schedule and agreement sought prior to the enactment of the Adamson act to cure between Plaintiff in Error and its trainmen the very conditions that the Adamson Act pretended to meet. There would be every reason for the purpose of establishing justice between the parties to observe the effect of the application of the Adamson Act to those conditions in existence at the time of the passage of the Act and out of which the contro-

versy which gave rise to the necessity for the law arose, which in the instant case would be the application of the Adamson Act to the old schedule, or Schedule "A".

Assume that Plaintiff in Error during the Congressional storms of the month of August, 1916, had developed a penchant for weird legislative prescience, and before its enactment had forecast the Adamson Law, and in a deliberate attempt to exempt itself before hand from the onerous burdens of the act, arbitrarily placed in effect between itself and its trainmen a 30 per cent reduction in wages, and so manipulated the situation, that such reduced schedule was in effect at the time of either the date of approval of the act or at the date it became effective. And assume that this plaintiff in Error were now before this Court contending that such arbitrarily reduced schedule constituted "present standard day's wage" within the meaning of the act. It is to be imagined that the Court would make short shift of the matter, and in so doing would hold that it was the wage schedules, a part of, pertinent and relevant to the conditions out of which the controversy arose and which necessitated the enactment of the Adamson Law that were within the eye of the act and would apply the law to those schedules which gave rise to the demands for the eight-hour day and time and one-half over time principle and upon which the reduction had been practiced.

As set forth in the statement of facts, the effect of granting the national demand for the eight hour day would have been a wage increase of twenty per cent over the conditions existing at the time such demand was made, and against this Plaintiff in Error

in a voluntary agreement with its trainmen granted increases, in particular to its brakemen, of from 25% to 28% over wage contracts then existing. If, on top of these increases, so granted, it were determined to apply the Adamson Act to the new and temporary schedule, (Schedule D), in th ecase of passenger brakemen the resulting compensation would be 20% above that provided by schedule D, 23% above the demands proposed by the trainmen of Plaintiff in Error in schedule C, and 53% above the wages provided to be paid by schedule A, which was of the conditions out of which the controversy arose; and in case of freight brakemen, the increase secured over schedule D would be 20%, an increase of 23% over the schedule proposed by the trainmen in schedule C, and over 50% above the wages provided under schedule "A", of the conditions out of which the controversy arose.

These considerations lead irrefutably to the

SECOND PROPOSITION

AT THE TIME THE NEW SCHEDULE, EFFECTIVE JUNE 16TH, 1916, WAS SET UP, PENDING THE SETTLEMENT OF THE NATIONAL CONTROVERSY, IT WAS THE UNDERSTANDING AND AGREEMENT BETWEEN PLAINTIFF IN ERROR AND ITS TRAINMEN, THAT THIS NEW SCHEDULE WAS IN ITS NATURE AND WITHIN THE CONTEMPLATION OF THE PARTIES, TEMPORARY, A *MODUS VIVENDI,* PENDING THE OUTCOME OF THE NATIONAL CONTROVERSY, AND THAT IN THE EVENT THE RESULT OF THAT CONTROVERSY

WAS TO ESTABLISH NATIONALLY THE EIGHT-HOUR DAY AND TIME AND ONE-HALF OVERTIME PRINCIPLE AS A BASIS FOR RAILWAY TRAINMEN COMPENSATION, A FURTHER ADJUSTMENT BETWEEN PLAINTIFF IN ERROR AND ITS TRAINMEN WOULD BE REQUIRED, AND IN RECOGNITION OF SUCH CONTINGENCY, IT WAS AGREED THAT IN THE EVENT THE EIGHT-HOUR DAY OR TIME AND ONE-HALF OVERTIME PRINCIPLE WAS TO BE APPLIED TO PLAINTIFF IN ERROR AND ITS TRAINMEN, THE NEW SCHEDULE "D" SHOULD NOT BE TAKEN AS THE BASIS FOR THE APPLICATION OF THAT PRINCIPLE AND SUCH SCHEDULE "D" IN SUCH EVENT DEEMED NEVER TO HAVE BEEN IN EXISTENCE. AN ENFORCED APPLICATION OF THE ADAMSON ACT NOT GIVING VALIDITY AND EFFECT TO THIS AGREEMENT IS AN APPLICATION INCONSISTENT WITH THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In this connection reference is made to the case of FORT SMITH AND WESTERN RAILROAD COMPANY et al. vs. MILLS, 253 U. S. 206; 64 L. Ed. 862.

In this case the appellant Railroad Company, in the hands of a receiver, subsequent to the passage of the Adamson Act, made an agreement with its trainmen as to hours of service and wages more advantageous to the Company than the terms of the Act. The district attorney threatened prosecution unless the receiver substituted the more oner-

ous terms of the act for the agreement made with the men, and a bill in equity was brought to enjoin the receiver from conforming to the Act. Here were present the elements of financial difficulties, probable inability of the Company to continue operation under the severe terms of the Act, and the willingness of the trainmen to abide by their agreement. But the decision of the Court is helpful in reaching a solution of the instant case in holding, that in maintaining the purpose, spirit and intendment of the Adamson Act, *it is not required, in spite of the universal language of the Act, that it be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce.*

We quote liberally from the opinion of the Court:

"The Act in question, known as the Adamson Law, was passed to meet the emergency created by the threat of a general railroad strike.

"In Wilson v. New, 243 U. S. 332; 61 L. Ed. 755 . . . it was decided that the Act was within the constitutional power of Congress to regulate commerce. . . . . But the bill in Wilson v. New raised only the general objections to the Act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue business at a loss. . . . *It was not decided that there might not be circumstances to which the Act could not be applied consistently with the Fifth Amendment, or that the Act, in spite of its universal language, must be construed to reach literally*

every carrier by railroad subject to the Act to Regulate Commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees subject to the Act. *But the Statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required, or to have been intended to make trouble rather than allay it.* We cannot suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before, and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor on other roads.

"But that is the present case. . . . . We must accept the allegations of the bill, and must assume that the men were not merely negatively refraining from demands under the Act, but, presumably appreciating the situation, desired to keep on as they were. *To break up such a bargain would be at least unjust and impolitic, and not at all within the ends the Adamson law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which, the law was passed, import an exception in this case.*"

In the case at bar, in June, 1916, the trainmen of Plaintiff in Error made upon it certain demands in general conformity to the demands made by the National Brotherhoods upon the railroads generally, based fundamentally upon the proposition of

an eight-hour day and time and one-half overtime. These demands were adjusted in July of 1916 by the agreement on the part of Plaintiff in Error to increase the pay of its trainmen approximately 20 per cent, in the particular of its brakemen from 25 to 28 per cent upon a ten-hour day and pro rata overtime basis, upon which basis operation had theretofore been carried on. This new wage schedule was made effective retroactively, as of June 16th, 1916. And it is to be borne in mind that this settlement and this advance in wages was agreed upon, at that time, for the express purpose of each party avoiding joining the national controversy, out of which the necessity of the enactment of the Adamson Act arose (Agreed Statement of Facts; Transcript 27).

At the time this new schedule was agreed upon (July 1916) the controversy between the National Brotherhoods (with which the employees of Plaintiff in Error were affiliated), and the railroads generally had not been settled, and it was recognized by Plaintiff in Error and its trainmen that if the Brotherhoods succeeded in having the eight-hour day and time and one-half overtime principle adopted as the basis of railroad compensation, in fairness to Plaintiff in Error, which had yielded so much to its trainmen in the new schedule effective June 16th, 1916, and by which an average compensation higher than that then demanded was accorded, although the principle of the eight-hour day and time and one-half overtime was not recognized. Accordingly the supplemental agreement was entered into, stipulating that in the event the principle of the eight-hour day and time and one-half overtime was applied to the

Plaintiff in Error, the new schedule should not be used as the basis of establishing the compensation upon that principle, from which follows the

THIRD PROPOSITION

THE TEMPORARY, CONDITIONAL SCHEDULE, SCHEDULE "D", EFFECTIVE JUNE 16th, 1916, DURING THE PENDENCY OF THE NATIONAL CONTROVERSY, AND PRIOR TO THE ENACTMENT OF THE ADAMSON LAW, AND FOR THE PURPOSE OF AVOIDING PARTICIPATION IN THE NATIONAL CONTROVERSY, AND AS A VOLUNTARY AND AMICABLE SETTLEMENT OF THE DEMANDS OF SAID TRAINMEN, MADE PURSUANT AND TANTAMOUNT TO SAID NATIONAL CONTROVERSY, DID NOT AFFORD THE "PRESENT STANDARD DAY'S WAGE" WITHIN THE MEANING OF SECTION 3 OF THE ADAMSON LAW.

If as contended for by Defendant in Error and as ruled by the learned lower court, the schedule of wages temporarily and conditionally established in Schedule "D", effective June 16th, 1916, by the voluntary agreement of Plaintiff in Error and its trainmen for the purpose of avoidance of participaiton in the National Controversy, is to be taken as "the present standard day's wage" within the meaning of Section 3 of the Adamson Act (despite the Supplemental agreement that it should not be so taken if an eight-hour day were subsequently established), the result will be that Plaintiff in Error, which, prior to the enactment of the Adamson Act, had settled its dispute with its trainmen by granting them increases tantamount to those caused subsequently by the Adamson Act, will be compelled to grant such trainmen, *because of that very fact*, still further increases.

In other words, whereas the railroads generally which caused the enactment of the Adamson Law, failing to come to an agreement with their employees, escape with the penalty of the 20 per cent increase provided by the act, Plaintiff in Error, which was involved in no dispute with its employees at the time of the passage of the Law, but which on the contrary, had adjusted its differences with its employees, will be mulcted to the extent of 50 to 53 per cent increase in the wages of its employees and in particular of its brakemen; and this northwithstanding the fact, that said employees had, *prior to the enactment of the Adamson Law,* expressly agreed that, in fairness to Plaintiff in Error, in the event the eight-hour day and time and one-half overtime principle were applied to Plaintiff in Error the new schedule would not be used as the basis for the application of the principle, and in that event would "not be considered as having been in effect" (Concluding provision of the Supplemental agreement) which plainly meant, that such principle should be applied to the previous schedule, Schedule "A", the schedule in effect at the time the controversy arose.

Assume Plaintiff in Error had stood its ground in July, 1916, and insisted on awaiting the outcome of the National controversy, as it could have done by entering the same in active participation, thereby forcing such entrance upon the part of its trainmen. The result would have been that Plaintiff in Error and its trainmen would have continued to operate under the old schedule, schedule "A", and would have been so operating at the date of the passage of the Adamson Law and upon the first day of January, 1917. Under such circumstances without the

possibility of controversy the pay of the trainmen of Plaintiff in Error would have been that resulting from the application of the Adamson Law to the Old Schedule "A". Under such condition the trainmen of Plaintiff in Error would have lost the benefits of the increases secured under the new schedule from June 16th, 1916, to the first of January, 1917, and during the entire limiting control of the Adamson Act would have lost the same benefits, in as much as Plaintiff in Error, although it insisted that it was required to apply the Adamson Act not to Schedule "D" the new schedule, but to Schedule "A" the old Schedule, voluntarily assumed the burden of wage payments under schedule "D", without the Adamson Law applied, where the earnings of the trainmen thereunder were in excess of earnings under schedule "A" with the Adamson Act applied. (Agreed Statement of Facts; Transcript XV-39) By reason of this concession on the part of Plaintiff in Error, Defendant in Error was paid for his services during the period in controversy the sum of $645.75 as against the sum of $573.52 earned under Schedule "A" with the Adamson Law applied. (Transcript 44).

As a result of this voluntary settlement in July, 1916, the trainmen of Plaintiff in Error, had the advantage and more of the Adamson Law for six and one-half months before it became operative for the train employees of the railroads in general in the United States; and now Defendant in Error in utter unfairness to Plaintiff in Error seeks to double his advantages by an act of duplicity by in effect applying the Adamson Law upon itself twice over, and appears in the ungenerous position of attempting to eat his cake and keep it.

Manifestly a construction of the statute which would work such gross injustice and absurdities should be avoided. As far as monetary considerations are concerned Plaintiff in Error in agreeing to the new schedule more than anticipated the Adamson Law, and to enforce an application of that law upon the new schedule is no more reasonable than would be a construction of the Safety Appliance Act, whereby a railroad, which prior to enactment or effectiveness of that Law installed all such appliances so required, would be compelled subsequently thereto to remove and re-install such safety devices.

By virtue of the several agreements between Plaintiff in Error and its trainmen herein considered, Plaintiff in Error had so adjusted its differences with them that there was thereafter no danger of a strike on their part and a consequent interruption of interstate commerce, because, not only had Plaintiff in Error granted its trainmen increases equal to what they would have received on the eight-hour day basis, but had provided by the supplemental agreement, for the contingency of an eight-hour day being established, that in that event the new conditional and temporary schedule "D" should be ignored and wages then adjusted with reference to the pre-existing schedules.

As stated over and over again by Chief Justice White, in delivering the majority opinion in Wilson v. New (supra) upholding the Adamson Law, the reason for the passage of that law and the justification for such exercise of power by Congress under the Constitution, was the fact that the railroads had failed to exercise their primary right to fix wages by agreement with their employees and the

consequent interruption of interstate commerce that was threatened. Thus at the outset of his discussion of the constitutionality of the law, the Chief Justice said:

> " . . . Concretely stated, therefore, the question is this: Did Congress have power *under the circumstances stated, that is, in dealing with the dispute between the employees and employers as to wages,* to provide a permanent eight-hour standard and to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power *in order to prevent the interruption of interstate commerce* to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees and to make its will on that subject controlling for the limited period provided for?"

And in discussing the question Chief Justice White said:

> "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority. But taking all these propositions as undoubted, if the situation which we

> have described and with which the Act of Congress dealt be taken into view, that of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted."

Thus the constitutionality of the action of Congress in the regulation created by the Adamson Law was fundamentally justified upon the ground that private interests had failed to exert the private right to establish mutually satisfactory standards of wages. In the instant case Plaintiff in Error and its trainmen had fully, completely and with mutual satisfaction exercised that private right, established a standard of wages satisfactory to each, and were peacefully operating thereunder at the time of the enactment of the Adamson Law.

Again the Chief Justice said:

> "It follows that the very absence of the scale of wages by agreement and the impediment and destruction of interstate commerce which was threatened, called for the appropriate and relevant remedy, the creation of a standard by operation of law binding upon the carrier"

Manifestly, Plaintiff in Error did not come within the class of carriers referred to by the Court. It had, with its employees, "a scale of wages fixed by agreement," and with respect to it, no interruption of interstate commerce was threatened. So far as Plaintiff in Error was concerned there was no necessity for the Adamson Law and no constitutional basis for the exercise by Congress of the power embodied in the law—*no ground for the deprivation by Congress of what the Court recognized as its primary right to fix wages by agreement with its employees.* It would be strange, therefore, if, under such circumstances, this Plaintiff in Error should be *doubly penalized* by the operation of such a law, and made to suffer far beyond those carriers whose failure to reach an agreement with their employees had brought about its enactment.

Section 3 of the Act is in furtherance of the purpose of Congress to avoid an interruption of interstate commerce through strikes on the part of the carriers' trainmen. It aimed to prevent the carriers, during the period of investigation mentioned therein, from making such disturbances by *arbitrarily* reducing the "present standard day's wage," as in that way they could avoid the increase in pay which the statute gave in order to placate their dissatisfied employees.

But in the case of Plaintiff in Error, its employees were not dissatisfied, were not threatening to strike, but, on the contrary, had reached an agreement with Plaintiff in Error with respect to their wages prior to the enactment of the law, and further in the event of the establishment of an eight-

hour day, had expressly agreed that wage schedules theretofore in force should be regarded as operative.

Considering the spirit and purpose of the statute, therefore, there is no reason for disregarding the agreement theretofore made between Plaintiff in Error and its trainmen, as to what should constitute the standard day's wage for the purpose of adjusting their pay on the eight-hour day basis. On the contrary, in all justice and fairness, neither the Government nor the trainmen would be justified, in the face of such prior understanding and agreement, in holding that the schedule effective June 16th, 1916 (Schedule "D"), and which was expressly limited in its duration by said understanding and agreement, should continue in force after the event which was to terminate it had occurred. In the face of said understanding and agreement, and considering the reason and purpose of the law, said conditional schedule, effective June 16th, 1916, cannot be considered the "present standard day's wage," within the meaning of the statute. By virtue of the agreement and the enactment of the Adamson Law, the schedule ceased *ipso facto* to exist and the schedule fixed by the prior contracts of Plaintiff in Error with its employees became operative and framed the "present standard day's wage" for such employees.

It is impossible to conceive how, by any fair construction of the law, in the light of the facts and circumstances surrounding the situation, the conditional schedule, effective June 16th, 1916, Schedule "D" can be said to continue in force, notwithstand-

ing the Supplemental Agreement, and to be the "present standard day's wage" within the meaning of the statute. But even if it could be said to be within the letter of the statute, which we can not admit, it certainly does not come within its purpose. *To hold otherwise would be to cause Plaintiff in Error to suffer for the concessions which it made to its employees in order to prevent the interruption of interstate commerce and to penalize it doubly for making such concessions.* Prior to the enactment of the statute, Plaintiff in Error had granted to its employees substantially all the increases that the statute subsequently gave to the employees of those roads that had not so settled their differences, and the contention now is on the part of Defendant in Error, that, despite the prior understanding and agreement to the contrary with its employees, Plaintiff in Error should have granted still greater increases—more than double that which the recalcitrant roads were called upon to pay.

Statutes, and especially penal statutes, are to be fairly construed, and the spirit of the statute is always considered as of greater importance than the letter, and as throwing light upon the construction to be given to its letter. The case of Holy Trinity Church v. United States, (143 U. S. 457; 36 L. Ed. 226) is in the effect that courts will not apply a penal statute contrary to its spirit and intent, although the case come within its letter.

The rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed, in disregard of their context, *and in frustration of the obvious legislative intent.*

U. S. v. Corbet 215 U. S. 233; 54 L. Ed. 173.

The more recent Standard Oil (221 U. S. 1; 55 L. Ed. 619) and Tobacco Company (221 U. S. 142; 55 L. Ed. 663) cases strikingly illustrate the proposition that penal statutes are to be given a reasonable and not an oppressive construction.

The opinion of the lower court in rendering judgment against Plaintiff in Error is based entirely upon the most strict adherence to and construction of the universal language of the statute, and proceeds upon the theory that by "the present standard day's wage" is meant that contract for wages, regardless of every consideration in relation thereto, that by chance was in existence or operative on the date of the effectiveness of the act, but Plaintiff in Error confidently submits upon the whole case and in full consideration of the facts and of the spirit and purpose of the Adamson Law, that the Court will not lend itself to the working of the great hardship and injustice which would be caused Plaintiff in Error by holding that the conditional and temporary Schedule "D" afforded the "present standard day's wage" and the basis of wage payment under application of the Adamson Law, and that following the clear and just reasoning of Justice Holmes in Fort Smith and Western Railroad Company v. Mills (supra) it will be found, that under the circumstances of this case the Adamson Act could not by reason of all these circumstances and conditions and the provisions of the Supplemental Agreement be applied consistently with the fifth amendment to the Constitution of the United States to the conditional and temporary Schedule "D"; that, in spite of the universal language of the Act, it is not required in every case it be construed to reach literally every carrier, regardless of justice, equity, and the obvious

purpose, spirit and intendment of the act; and that the judicial assumption will be indulged in, that the "circumstances in which, and the purpose for which, the law was passed, import an exception in a case like this"; and that under the circumstances of this case, it will be the judgment of the Court, either, that if the Adamson Law was applicable to Plaintiff in Error and its Trainmen, its application was legally and properly to the old Schedule, or Schedule "A", or if the act was not applicable to Plaintiff in Error and its Trainmen, all legal requirements upon Plaintiff in Error were satisfied by continued payment under Schedule "D" during the control period of the Adamson Law.

We earnestly contend, therefore, that the District Court erred in entering Judgment against Plaintiff in Error, and that the same should be reversed.

Respectfully submitted,

LEWIS & ELLIOTT
H. A. ELLIOTT
E. W. LEWIS.

No. 3649

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E ARIZONA AND NEW MEXICO
ILWAY COMPANY,
CORPORATION,
Plaintiff in Error,

vs.

E. FOLEY,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

BRIEF OF DEFENDANT IN ERROR.

L. KEARNEY, of Clifton, Arizona,
Attorney for Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,
A CORPORATION,
Plaintiff in Error,

vs.

H. E. FOLEY,
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This is a much travel stained case. It was begun in justice court to recover a few dollars due for labor, and removed to the federal district court, and now it is in this court. If there ever was a proper case in which to impose a penalty for frivolous appeal, surely this is it.

Practically the whole of appellant's brief is based upon a

self-claimed plea of fairness and justice, but it entirely ignores the law, and forgets that the purpose of the Adamson Act was to increase salaries of railroad employees and was passed with that object in view.

Plaintiff in error, in its zeal, has forgotten that in adopting Schdule D, on June 16th, 1916, (*Transcript p.* 28,) that it contained this provision:

> "All rates of pay, rules and regulations previously in effect are null and void."

If this did not wipe out Schedule A, adopted April 1, 1911, (*Transcript p.* 9,) then we are free to admit that words have no meaning.

Proposed Schedule B, Transcript pp. was never adopted.

Schedule D, Transcript pp. 28-36, was the only schedule of salaries in force when the Adamson Act became law, and was the only schedule of pay that the Adamson Act could be applied to. All former pay schedules had been abrogated.

Schedule E, Transcript pp. 37-38, did not contemplate the enactment of a law fixing salaries, but had in view the possibility of making another contract,—note the words therein used. (*Transcript p.* 37.)

> "That in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for over time, or both of these provisions, that the new schedule of June 16th, 1916, will not be used as a basis on which to figure out rates of pay or working conditions."

This contemplated a possible change in salaries by contract in the indefinite future, and could not have had in view the Adamson Act fixing salaries of employees. Sec. 1 of the Adamson Act does not present the condition of the employee asking for a new wage schedule; that law fixed the compensation. The Act says, "'that beginning January, 1917, eight hours shall in all contracts for labor and services, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by rail."

Section 3 of the Act provides that the "compensation of

railway employees subject to this act for a standard eight-hour day shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employee shall be paid at a rate not less than the pro rata for such standard eight-hour work day."

Under this law the employee's pay is fixed. It does not present the question of the employee contracting for, or asking for, another schedule of pay, the law has fixed the schedule, and says that his pay shall not be reduced.

It appears from page 39 of Transcript that plaintiff in error has entirely disregarded the Adamson Act, and went back to Schedule A, which had no existence when the Adamson Act became law, and made this obsolete schedule the basis for paying its employees.

If plaintiff in error had applied the Adamson Act to Schedule D, the only schedule in force when this act became law, as it should have done in obedience to that law, then the defendant in error would have received the compensation sued for herein.

As the Honorable, Farrington, District Judge in his opinion rendered on deciding this case, Transcript pp. 47-55, has fully covered all the features of the case, further statement is unnecessary.

Respectfully submitted,

L. KEARNEY,

Attorney for Defendant in Error.

No. 3656

9

United States

Circuit Court of Appeals

For the Ninth Circuit.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3656

United States

Circuit Court of Appeals

For the Ninth Circuit.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

IN PERSONAM.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Praecipe for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit and include in said transcript the following:

1. Statement required by Admiralty Rule 4, Section 1, Subdivision 1, of said Circuit Court of Appeals.

2. All the pleadings, together with the exhibits annexed thereto, the same being:

(a) Amended libel and interrogatories.

(b) Answer to amended libel and interrogatories and interrogatories propounded by libelee.

(c) Amendment to answer to amended libel.

(d) Libelant's answers to libelee's interrogatories.

3. All testimony and depositions taken in said cause.

4. Court minutes or proceedings and orders in the above cause.

5. The opinion by Rudkin, D. J.

6. The final decree.

7. The original exhibits introduced in evidence in the above [1*] cause, together with stipulation of counsel and order of Court for their transmission to the Circuit Court of Appeals.

8. Notice of appeal, notice of filing bond on appeal and assignment of errors.

9. This praecipe.

Dated February 21, 1921.

GLENSOR, CLEWE & VAN DINE,
Proctors for Libelant.

Due service and receipt of a copy of the within —— is hereby admitted this —— day of ——, 19—.

FORD & JOHNSON,
Attorney for ————.

[Endorsed]: Filed Feb. 23, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Apostles on Appeal.

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 16,755.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent.

Statement of Clerk U. S. District Court.

PARTIES.

Libelant: BALDWIN SHIPPING COMPANY, INC., a Corporation.

Respondent: SOUTHERN PACIFIC COMPANY, a Corporation. [3]

PROCTORS.

For Libelant and Appellant: GLENSOR, CLEWE & VAN DINE, San Francisco, Calif.

For Respondent and Appellee: FORD & JOHNSON, San Francisco, Calif.

PROCEEDINGS.

1920.

January 7. Filed libel *in personam* for breach of contract.

Issued citation for the appearance of respondent, which was afterwards, to wit, on January 27th.

1920, returned, with the following return of the United States marshal endorsed thereon:

"I have served this writ personally, by copy on Southern Pacific Company, by handing copy personally to E. A. Van Wynan, Statutory Agent, this 8th day of January, A. D. 1920.

J. B. HOLOHAN,
U. S. Marshal.
By C. G. Martin,
Deputy Marshal."

30. Filed exceptions to libel.

February 21. A hearing was this day had, before the Honorable Frank H. Rudkin, Judge, on the exceptions to libel, and the matter ordered submitted on the records.

25. Filed order that the exceptions to libel be sustained so far as they pertain to the nonattachment of shipping contract. [4]

March 5. Filed amended libel with interrogatories attached.

24. Filed exceptions to amended libel.

27. A hearing was this day had on the exceptions to the amended libel, before the Honorable R. S. Bean, Judge, and after argument by counsel, were ordered overruled.

April 22. Filed answer to amended libel, with answers to interrogatories propounded by libelant attached, and, also, interrogatories propounded by respondent.

Filed libelant's answers to interrogatories propounded by respondent.

August 19. Filed amendment to answer to amended libel.

Filed deposition of Glenna De Witt Green, taken on behalf of libelant.

Filed deposition of John Gray Stubbs, taken on behalf of libelant.

This cause came on this day for hearing, before the Honorable Frank H. Rudkin, Judge. After hearing, the cause was ordered submitted.

November 8. Filed opinion by Judge Frank H. Rudkin, dismissing libel.

December 8. Filed final decree.

1921.

February 23. Filed notice of appeal.

Filed assignment of errors.

Filed bond on appeal in the sum of $250.00.

Filed testimony taken in open court.

[5]

In the Southern Division of the United States District Court of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

IN PERSONAM.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Amended Libel.

To the Honorable Judges of the United States District Court, Southern Division, in and for the Northern District of California:

The amended libel of Baldwin Shipping Company, Inc., an Illinois corporation, against Southern Pacific Company, a corporation, in a cause of contract civil and maritime, for a first cause of libel alleges:

I.

That libelant is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, engaged in the business of freight forwarding agent, and having an agent in the City and County of San Francisco, State of California.

II.

That libelee is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky.

III.

That heretofore, to wit, on or about the 22d day of June, 1917, libelee agrees with libelant to reserve steamer space for the transportation of and to transport, or cause to be transported from [6] San Francisco, California, to Japan, two thousand (2,000) tons of pig iron and steel articles, inexcessive sizes, for late July, August and September, 1917, clearance, at the rate of $15.00 per ton, weight or measurement ship's option.

IV.

That libelee did not reserve steamer space for said commoditiy, or any part thereof.

That at divers and various times during the three months July, August and September, 1917, libelant tendered to libelee said two thousand (2,000) tons of pig iron and steel articles, inexcessive sizes, for transportation to Japan, and demanded steamer space for the transportation of and the transportation thereof from the port of San Francisco to Japan, but libelee failed, neglected and refused to accept said commodity, or any part thereof, for transportation, or to transport said commodity, or cause it to be transported, or to furnish or supply steamer space for the transportation thereof, or any part thereof, in accordance with the terms of said agreement or at all.

V.

That by reason of libelee's breach of said agreement, libelant was obliged to and did procure other space and transportation for said commodity, and the whole thereof, at the market rate for ocean space from the port of San Francisco to Japan, at the earliest time possible for libelant to obtain space therefor after the breach of said agreement, and libelant was obliged to pay and did pay for the transportation of said commodity the sum of ten thousand dollars in excess of the agreed rate, to wit, two thousand tons at $15.00 per ton, to its damage in the said sum of ten thousand dollars.

VI.

That the said rates so paid by libelant for the transportation [7] of said commodity were just and reasonable and were and constituted the reasonable and prevailing market rates for said commodity from San Francisco to Japan at the earliest date after the breach of said agreement it was possible for libelant to secure other space and transportation therefor.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

For a further, second and separate cause of libel against libelee, libelant alleges:

I.

That libelant is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, engaged in the business of

freight forwarding agent, and having an agent in the City and County of San Francisco, State of California.

II.

That libelee is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky.

III.

That heretofore, to wit, on or about the 28th day of June, 1917, libelee agreed with libelant to reserve steamship space for the transportation of and to transport, or cause to be transported from the port of San Francisco to Kobe and Yokohama, Japan, two thousand five hundred (2,500) tons of pig iron and steel articles at the rate of fifteen dollars ($15.00) per ton, weight or measurement ship's option, for August to December, 1917, clearance.

IV.

That libelee did not reserve steamer space for said commodity, [8] or any part thereof.

That libelant at divers and various times during the months August to Decembed, 1917, tendered libelee said two thousand five hundred (2,500) tons of pig iron and steel articles for transportation to Kobe and Yokohama, Japan, and demanded space therefor and the transportation thereof to said ports; that libelee failed, neglected and refused to accept said commodity for transportation, to furnish steamer space therefor, or to transport said commodity, or any part thereof, to Kobe and Yokohama, Japan.

V.

That by reason of libelee's breach of said agreement and refusal to accept said commodity for transportation, cause same to be transported, or furnish space for the transportaion thereof, libelant was obliged to and did procure other space and transportation therefor, and was obliged to and did pay for the transportation of said commodity the sum of twelve thousand five hundred dollars ($12,500.00) in excess of the agreed rate, to wit, 2,500 tons at $15.00 per ton, to its damage in the said sum of twelve thousand five hundred dollars ($12,500.00).

VI.

That the said rates so paid by libelant for the transportation of said commodity were just and reasonable and were and constituted the reasonable and prevailing market rates for said commodity from San Francisco to Kobe and Yokohama, Japan, at the earliest date after the breach of said agreement it was possible for libelant to secure other space and transportation therefor.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court. [9]

For a further, third and separate cause of libel against libelee, libelant alleges:

I.

That libel is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois engaged in the business of

freight forwarding agent, and having an agent in the City and County of San Francisco, State of California.

II.

That libelee is a corporation organized, existing and doing business under and by virtue of the laws of the state of Kentucky.

III.

That heretofore, to wit, on or about the 22d day of June, 1917, libelee agreed with libelant to reserve space for the transportation of and to transport, or cause to be transported seven hundred and fifty tons of tinplate a month for September, October, November and December, 1917, clearance to Shanghai, at the rate of sixteen dollars per ton, weight or measurement ship's option.

IV.

That libelee did not reserve steamer space for said commodity, or any part thereof.

That during the months of September, October, November and December, 1917, and each of said months, libelant tendered seven hundred and fifty (750) tons of tinplate for transportation to Shanghai and demanded steamship space therefor; that libelee failed, neglected and refused to accept for transportation, to furnish steamship space for, or to transport, or cause to be transported said seven hundred and fifty tons of tinplate during any of said months, or at all; that libelant was obliged to and did procure other transportation therefor, and was obliged to and did pay the rate of twenty-two dollars and fifty cents ($22.50) per ton from San

Francisco [10] to Shanghai for said tinplate and the whole thereof, to its damage in the sum of nineteen thousand five hundred dollars ($19,500.00).

VI.

That the said rate so paid by libelant for the transportation of said commodity was just and reasonable and was and constituted the reasonable and prevailing market rate for said commodity from San Francisco to Shanghai at the earliest date after the breach of said agreement it was possible for libelant to secure other space and transportation therefor.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libelant prays that the said Southern Pacific Company, a corporation, be cited to appear and answer all and singular the matters aforesaid, and to also answer, on oath or solemn affirmation, the interrogatories propounded by libelant to it, attached hereto and made a part hereof, and that this Honorable Court will decree the payment of damages aforesaid, with interest and costs, and that libelant may receive such other and further relief as may be meet in the premises.

Dated March 4, 1920.

AITKEN, GLENSOR, CLEWE & VAN DINE,

Proctors for Libelant. [11]

State of California,
City and County of San Francisco,—ss.

F. E. Ragland, being first duly sworn, deposes and says:

That he is agent for Baldwin Shipping Company, Inc., a corporation, libelant in the above and foregoing libel; that certain of the matters set forth in the foregoing libel are derived from personal knowledge and the remaining matters set forth are derived from original documents and correspondence on file in the office of the said libelant; that affiant has read the foregoing libel and knows the contents thereof, and as to the matters therein derived from personal knowledge the same are true, and as to the remaining matters therein stated they are true to the best of affiant's knowledge, information and belief.

F. E. RAGLAND.

Subscribed and sworn to before me this 4th day of March, A. D. 1920.

[Seal of the Notary] W. H. PEYBURN,
Notary Public in and for the City and County of San Francisco, State of California. [12]

Interrogatories Propounded to Libelee.

1. Was J. G. Stubbs employed by libelee during the month of June, 1917?

2. If your answer to the foregoing Interrogatory is "Yes," in what capacity was J. G. Stubbs employed during the month of June, 1917?

Due service and receipt of a copy of the within

amended libel is hereby admitted this 4th day of March, 1920.

GEO. K. FORD,
Attorney for ————.

[Endorsed]: Filed Mar. 5, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the Southern Division of the United States District Court of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

IN PERSONAM.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Answer to Amended Libel.

Comes now the libelee above named and answers the allegations of the amended libel herein, and in answer to the allegations in the first cause of libel therein contained, and by way of answer admits, denies, alleges and avers as follows, to wit:

Avers that it has no information or belief sufficient to answer the allegations contained in paragraph I of said first cause of libel, and basing its

denial upon this ground, denies each and every, all and singular the allegations contained therein.

Admits the allegations contained in paragraph II of said first cause of libel.

Denies that heretofore or on or about the 22d day of June, 1917, libelee agreed with libelant to reserve steamer space for the transportation of or transport or cause to be transported from San Francisco, California, or from any other place at all to Japan, or any other place at all, two thousand tons of pig iron, or steel articles inexcessive or any sizes or at all, for late or any July or August or [14] September, 1917, clearance at a rate of $15.00 per ton, or at any other price or at all.

Denies that libelee did not reserve steamer space for said commodity or any part thereof.

Denies that at divers or various or any times during the months of July or August or September of 1917, libelant tendered to libelee said two thousand (2,000) tons of pig iron or steel articles, inexcessive sizes, for transportation to Japan or demanded steamer space for the transportation of or the transportation thereof from the port of San Francisco to Japan, or that libelee failed or neglected or refused to accept said or any commodity or any part thereof for transportation, or to transport said or any commodity or cause it to be transported, or furnish or supply steamer space for the transportation thereof, in accordance with the terms of said or any agreement.

Denies that by reason of libelee's or any breach of said or any agreement, libelant was obliged to or

did procure other space or transportation for said commodity, or the whole thereof at the or any market rate for ocean space from the port of San Francisco to Japan at the earliest or any time possible for libelant to obtain space therefor after the or any alleged breach of said or any agreement, or that libelant by reason of the alleged or any breach of said or any agreement was obliged to or did pay for the or any transportation of said or any commodity the sum of ten thousand dollars or any other sum in excess of the or any agreed rate to its damage in the sum of ten thousand dollars, or any other sum at all.

Denies that said or any rates so or at all paid by libelant for the or any transportation of the or any commodity were just or reasonable or were or constituted the reasonable [15] or prevailing market rates for said or any commodity from San Francisco to Japan at the earliest or any date after the or any breach of said or any agreement it was possible for libelant to secure.

Denies that all and singular the or any premises are true.

In further answer to the second or separate cause of libel therein contained, libelee avers that it has not sufficient information or belief to enable it to answer the allegations contained in paragraph I of said second cause of libel, and basing its denial thereof upon this ground, denies each and every, all and singular the allegations and each and every part thereof contained.

Denies that heretofore or on or about the 28th

day of June, 1917, libelee agreed with libelant to reserve steamship or any space for the or any transportation of or to transport or cause to be transported from the port of San Francisco to Kobe or Yokohama, Japan, 2,500 tons or any other quantity of pig iron or steel articles, at the or any rate of $15.00 per ton, or any other price at all, weight or measurement of ship's option for August to December, 1917, clearance, or for a clearance at any other time at all.

Denies that libelee did not reserve steamer space for said or any commodity or any part thereof.

Denies that libelee at divers or various times during the or any months from August to December, 1917, tendered libelee in conformity to said or any agreement said 2,500 tons of pig iron or steel articles for transportation to Kobe or Yokohama, Japan, or demanded space therefor or the transportation [16] thereof to said or any ports.

Denies that libelee failed or neglected or refused to accept said or any commodity for transportation or to furnish steamer space therefor, or to transport said or any commodity or any part thereof to Kobe or Yohohama, Japan, in violation or breach of any agreement between the parties hereto.

Denies that by reason of libelee's alleged or any breach of said or any agreement or refusal to accept said or any commodity for transportation or cause the same to be transported or to furnish space for transportation thereof, libelant was obliged to or did procure other space or transportation therefor or at all or was obliged to or did pay for

the transportation of said or any commodity the sum of twelve thousand five hundred (12,500) dollars, or any other sum in excess of the alleged agreed rate to its or any damage in the sum of twelve thousand five hundred (12,500) dollars, or any other sum or at all.

Denies that said rates so or at all paid by libelant for transportation of said or any commodity were or constituted the or any reasonable or prevailing market rates for said or any commodity from San Francisco to Kobe or Yokohama, Japan, at the earliest or any date after the breach or alleged breach of said or any agreement it was possible for libelant to secure other or any space or transportation therefor.

Denies that all or singular the premises are true.

In answer to the third and separate cause of libel in said libel contained, libelee avers that it has no information or belief sufficient to enable it to answer the allegations contained in paragraph I of said third cause of libel, and [17] basing its denial upon this ground, denies each and every all and singular the allegations contained therein and each and every part thereof.

Denies that heretofore or on or about the 22d day of June, 1917, or at any other time or at all, libelee agreed with libelant to reserve any space for the or any transportation of or to transport or cause to be transported 750 tons or any other quantity of tinplate or any other commodity a month for September or October or November or December, 1917, clearance to Shanghai, at the or any rate of $16.00

per ton, or at any other price at all, weight or measurement ship's option.

Denies that libelee did not reserve steamer space for said or any commodity or any part thereof.

Denies that during the months of September or October or November or December, 1917, or during each of said or any months libelant tendered 750 tons of tinplate or any other quantity thereof for transportation to Shanghai or demanded steamship space therefor in conformity with the terms of said or any agreement. Denies that libelee failed or neglected or refused to accept for transportation or to furnish steamship space for or to transport or cause to be transported said 750 tons of tinplate or any other quantity thereof during said months or at all in conformity with said or any agreement.

Denies that libelee, through the breach of said alleged or any agreement, was obliged to or did procure other transportation therefor, or was obliged or did pay the or any rate of $22.50 per ton from San Francisco to Shanghai for said or any tinplate or the whole thereof to its damage in the sum of nineteen thousand five hundred ($19,500) dollars or any other sum at all. [18]

Denies that said or any rate so or at all paid by libelant for transportation of said or any commodity was or constituted the or any reasonable or prevailing market rate for said commodity from San Francisco to Japan at the earliest or any date after the breach or alleged breach of said or any agreement it was possible for libelant to secure

other or any space or transportation therefor.

Denies that all or singular the premises are true.

WHEREFORE, libellee prays that libelant be caused to answer on oath or solemn affirmation the interrogatories propounded by libelee to it attached hereto and made a part hereof, and that this Honorable Court thereafter dismiss the libel and each cause of libel therein contained, with costs of suit to libelee.

FORD & JOHNSON.
Proctors for Libelee. [19]

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says: That he is assistant secretary of the Southern Pacific Company, a corporation, defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 20th day of April, 1920.

[Seal] FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California. [20]

Answers to Interrogatories Propounded to Libelee.

Answer to Interrogatory No. 1:

J. G. Stubbs was employed by the libelee during the month of June, 1917.

Answer to Interrogatory No. 2:

J. G. Stubbs was employed during the month of June, 1917, by the libelee as assistant general freight agent. [21]

Interrogatories to be Propounded to Libelant.

1. Was the alleged contract referred to in the first cause of libel of a date on or about the 22d day of June, 1917, a verbal contract or a written one?
2. If your answer to the first interrogatory is that it was written, please attach a copy thereof; if the same is in one part or if the same is made up of various instruments attach copies of all writings alleged to compose said contract.
3. Is the alleged contract referred to in the second cause of libel of a date on or about June 28, 1917, a verbal contract or is it in writing?
4. If the answer to the third interrogatory is that the contract is written, please attach copies of all writings alleged to compose said contract.
5. Is the alleged contract referred to in the third cause of libel of a date on or about the 22d day of June, 1917, oral, or is said contract in writing?
6. If your answer to the preceding interrogatory is that said contract was in writing, please attach copies of all writings alleged to compose said contract.

[Endorsed]: Filed Apr. 22d, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

In the Southern Division of the United States District Court of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

IN PERSONAM.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Libelant's Answers to Interrogatories Propounded by Libelee.

Answer to Interrogatory No. 1:

Written.

Answer to Interrogatory No. 2:

Letters exchanged between the parties hereto as follows:

"SOUTHERN PACIFIC COMPANY.

San Francisco, Cal., June 22nd, 1917.

No. 1.-E.—Contract 608.

Baldwin Shipping Company,

433 California St.

San Francisco, Cal.

Gentlemen:—

Confirming Phone Conversation.

We have booked for your account 2000 tons of pig iron and steel articles, inexcessive sizes, Japan

late July August September, at $15.00 per ton, weight or measurement, ship's option.

This will be covered by Southern Pacific Contract 608.

Kindly confirm in writing.

Yours truly,

(Signed) J. G. STUBBS." [23]

"BALDWIN SHIPPING COMPANY.

San Francisco, June 26th, 1917.

S. F. 1112.

Subject—2,000 tons steel articles—Japan.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Co.,
San Francisco, Calif.

Dear Sir:

This will acknowledge receipt of your letter of June 22nd, File 1—E, contract 608, booking for the account of the Baldwin Shipping Company, 2,000 tons pig iron and steel articles, inexcessive sizes, Japan late July, August and September clearance at ocean rate of $15.00 per ton, weight or measurement, ship's option,—covered by your contract 608.

You have advised us that just at the present time you cannot divulge to us name of steamer line with whom you have booked these 2,000 tons steel articles, but that you guarantee to protect $15.00 rate, and clear on first-class steamers carrying lowest rate of insurance, however, as soon as you are able to advise us with whom you have booked this freight; please do so in order that we may give instructions to our New York office, relative to the issuance of the bills of lading.

We will keep you advised of the forwarding of this business from the mills, and, if we can be of any further assistance to you, do not fail to let us know.

Yours truly,

(Sgd.) BALDWIN SHIPPING CO.

J. H. S.

CC—Ny. In routing this business do not fail to see that the S. P. is the terminal delivery line."

[24]

Answer to Interrogatories Nos. 3 and 4:

A verbal agreement was made after which the following writings were exchanged:

"SOUTHERN PACIFIC COMPANY.

1–E Iron & Steel Contract 613.

San Francisco, Calif., June 28th, 1917.

Messrs. G. R. Haley & Company,

149 California street,

San Francisco, Calif.

Gentlemen:

Confirming phone conversation date:

Please book for the Southern Pacific 2,500 tons Pig Iron and Steel articles for August and December clearance to Kobe and Yokohama at $15.00 weight or measurement, ship's option.

This will be covered by Southern Pacific contract 613.

I am attaching hereto an extra copy of this let-

ter and would thank you to place acknowledgment thereon and return.

Yours truly,

J. G. STUBBS.

J.M.H.

Enclosures.

CC—Baldwin Shipping Co.,
433 California St., City."

"BALDWIN SHIPPING COMPANY.

June 28, 1917.

S. F. 1113.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Company,
San Francisco, Cal.

Dear Sir:—

This will confirm telephone conversation with your Mr. Brown, booking firm for the account of the Baldwin Shipping Company, 2,500 tons of steel articles, inexcessive sizes, destined Kobe-Yokohama, for clearance from San Francisco, August [25] to December, inclusive, 1917, at ocean rate of $15.00 weight or measurement, ship's option, covered by your contract No. 613.

You advise that you protect ocean rate of $15.00 per ton, and to clear on first-class steamers, carrying lowest rate of insurance, however, at the earliest possible date would thank you to advise steamer line with which you booked these 2500 tons, so that we can instruct our New York office relative to issuance of bills of lading.

Please acknowledge.

Yours truly,
BALDWIN SHIPPING CO.,
(Sgd.) J. H. SIMMONS,
Vice-pres."

Answer to Interrogatory No. 5.

Writing.

Answer to Interrogatory No. 6.

"SOUTHERN PACIFIC COMPANY.
San Francisco, Cal., June 22nd, 1917.
1-E—Contract 607.

Baldwin Shipping Company,
433 California St.,
San Francisco, Cal.

Gentlemen:—

Referring to our phone conversation we have booked for your account 750 tons of tinplate a month from September October November and December to Shanghai at $16.00 per ton weight or measurement ship's option.

This will be covered by Sou. Pac. Contract 607.

Kindly confirm in writing.

Yours truly,
(Signed) J. G. STUBBS." [26]

"June 26th, 1917.
Tinplate.

Subject—3,000 Tons Tinplate—Shanghai.
Sept. to Dec. 1917, Inc.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Co.,
San Francisco, Cal.

Dear Sir:—

This will acknowledge receipt of your letter of

June 22nd, File 1—E Contract #607, booking for the account of the Baldwin Shipping Company 750 tons tinplate per month, September, October, November and December, 1917, at ocean rate of $16.00 per ton, weight or measurement, ship's option,—destined Shanghai and covered by your Contract No. 607.

You have advised us that at the present time you cannot inform us of the name of line with which you have booked this 3,000 tons of tinplate, but guarantee to clear on first-class steamers carrying lowest rate of insurance, and to protect the above rate,—this is agreeable to us, however, at the earliest possible date let us know with whom you have booked this business so that we can give instructions to our New York office, relative to issuance of the bills of lading.

We will keep you advised of the forwarding of this business from the mills, and, if we can assist you in any way, do not fail to let us know.

Yours truly,
BALDWIN SHIPPING COMPANY.
J. H. SIMMONS,
Vice-pres.

cc—NY.

Chge. In taking out ladings on this business see that So. Pac. is the Terminal delivery line." [27]

State of California,
City and County of San Francisco,—ss.

F. E. Ragland, being first duly sworn, deposes and says:

That he is agent of libelant in the State of Cali-

fornia and makes this verification on its behalf; that the foregoing answers to interrogatories are true to the best of affiant's knowledge, information and belief.

F. E. RAGLAND.

Subscribed and sworn to before me this 22d day of April, A. D. 1920.

[Seal] W. H. PYBURN,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within answers to interrogatories is hereby admitted this 22d day of April, 1920.

FORD & JOHNSON,
Attorneys for Libelee.

[Endorsed]: Filed Apr. 22, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the Southern Division of the United States District Court of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

IN PERSONAM.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libellee.

Amendment to Answer to Amended Libel.

Comes now the libelee and by leave of Court first had and obtained, files this its amendment to the answer to the amended libel herein, and by way of further answer in connection with the allegations of said amended libel numbered therein Paragraph II in the first, second and third causes of libel as contained therein, avers:

That the libelee was, on or about the 22d day of June, 1917, and on or about the 28th day of June, 1917, and at all times in said amended libel mentioned, and for a long time prior thereto, a common carrier engaged in interstate commerce in the United States of America. That at the said times the libelee did not own, control or operate any steamship or steamship line between the ports of San Francisco, State of California, or any Pacific Coast port and any port in Japan, or between the port of San Francisco and the Ports of Kobe or Yokohama, Japan, or between the port of San Francisco or any Pacific Coast Port and the Port of Shanghai in China, and did not own, operate or control any means of transportation between said ports, or any of them, at any time mentioned in [29] said libel or particularly during the months of June, July, August, September, October, November and December, in 1917, and that libelee has never published or filed with the Interstate Commerce Commission of the United States of America a through rate from any Pacific Coast Port, or particularly the Port of San Francisco, California, and any for-

eign port, or particularly ports of Japan and China.

WHEREFORE, libelee prays that this Honorable Court dismiss the libel and each cause of libel therein contained, with costs of suit to libelee.

_____,

Proctors for Libelee. [30]

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says: That he is Assistant Secretary of the Southern Pacific Company, a corporation, the defendant in the above-entitled action; that he has read the foregoing amendment to answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me, this 19th day of August, 1920.

[Seal] FRANK HARVEY,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 19, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [31]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the nineteenth day of August, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 16,755.

BALDWIN SHIPPING CO.

vs.

SOUTHERN PACIFIC CO.

Minutes of Court—August 19, 1920—Trial.

This cause came on regularly this day for hearing of the issues joined herein. H. W. Glensor, Esq., and Ernest Clewe, Esq., were present as proctors on behalf of libelant. George Ford, Esq., and F. Johnson, Esq., were present as proctors for respondent. The respective proctors made statements of the nature of the cause. Mr. Glensor introduced in evidence and filed the depositions of Glenna De Witt Green and John Gray Stubbs, and called Mrs. G. De Witt Green, who was duly sworn and examined on behalf of libelant and introduced in evidence certain exhibits which were filed and marked Libelant's Exhibits Nos. 1 and 2 (letters), and thereupon rested cause on behalf of libelant.

Mr. Ford called Percy P. Dougherty, S. W. Brown, L. S. Boyson and R. Roche, each of whom was duly sworn and examined on behalf of re-

spondent and thereupon rested cause on behalf of respondent.

Mr. Glensor called in rebuttal F. E. Ragland, who was duly sworn and examined, and thereupon rested libelant's case. After hearing the respective proctors, the Court ordered that this cause be submitted on points and authorities to be filed in 10, 10 and 5 days. [32]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent.

(Deposition of Glenna De Witt Green, Taken on Behalf of Libelant.

BE IT REMEMBERED: That on Monday, June 28, 1920, pursuant to stipulation of counsel hereunto annexed, at the offices of H. W. Glensor, Esq., in the Mills Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of Cali-

fornia, authorized to take acknowledgments of bail and affidavits, etc., GLENNA DE WITT GREEN, a witness called on behalf of the libelant.

H. W. Glensor, Esq., appeared as proctor for the libelant, and George Ford, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant at the offices of H. W. Glensor, Esq., in the Mills Building, in the City and County of San Francisco, State of California, on Monday, June 28, 1920, before Francis Krull, [33] a United States Commissioner for the Northern District of California, and in shorthand by E. W. Lehner.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to the materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.) [34]

(Deposition of Glenna De Witt Green.)

GLENNA DE WITT GREEN, called as a witness for the libelant, sworn.

Mr. GLENSOR.—Q. Mrs. Green, where do you reside? A. 1077 Ashbury Street.

Q. San Francisco? A. San Francisco.

Q. Were you ever employed by the Baldwin Shipping Company? A. Yes.

Q. Where? A. San Francisco.

Q. In their San Francisco office? A. Yes.

Q. When?

A. From about October, 1916, until December, 1919.

Q. In what capacity were you employed?

A. Secretary to the general manager.

Q. In your capacity as secretary to the general manager, did you or did you not have occasion to make booking contracts and negotiate booking contracts for ocean space?

A. I did; I had occasion to; in fact, I made a great many.

Q. I show you a document purporting to be a letter marked "No. 1 E Contract 607," and ask you if you ever saw that document before.

A. Yes.

Q. Where?

A. At the office of the Baldwin Shipping Company.

Q. Where did it come to you from?

A. From the Southern Pacific Company.

Q. Through the mails?

A. Through the mails.

(Deposition of Glenna De Witt Green.)

Q. That is dated June 22, 1917, No. 1 E Contract 607, and reads as follows:

"In reply please refer to No. 1 E Contract 607, San Francisco, Cal., June 22, 1917.

"Baldwin Shipping Company,
"433 California Street,
"San Francisco, Cal.

"Gentlemen:

"Referring to our 'phone conversation, we have booked for your account 750 tons of tin plate a month for September, [35] October, November and December to Shanghai at $16 a ton, weight or measurements, ship's option.

"This will be covered by Sou. Pac. Contract No. 607.

"Kindly confirm in writing.

"Yours truly,
"J. G. STUBBS,
"L. F. B."

A. Yes.

Q. I show you this document and ask you if you ever saw that before. A. Yes.

Q. Where? A. I wrote the letter myself.

Q. This purports to be a carbon copy. Did you write the original and make a copy at the same time? A. Surely.

Q. What did you do with the original?

A. I sent it to the office of J. G. Stubbs, of the Southern Pacific Company.

Q. Did you mail it yourself? A. Yes.

Q. Did you sign it yourself? A. Yes.

(Deposition of Glenna De Witt Green.)

Q. What name did you sign to it?

A. "J. H. Simmons, per D."

Q. The "D." meaning yourself? A. Yes.

Q. Was that the customary manner of handling these bookings at that time? A. Yes.

Mr. GLENSOR.—I will ask that the first letter shown the witness be marked "Libelant's Exhibit 1 for Identification," and the last letter "Libelant's Exhibit 4 for Identification."

(The letters were so marked.)

Q. Now, I call your attention to Libelant's Exhibit 1 for Identification, being the letter which I showed you a moment ago, and call your attention to the first line, which says, "Referring to our phone conversation"; did you, yourself, have the conversation referred to in that letter? A. Yes.

Q. Who with?

A. Well, with the booking agent in Mr. Stubbs' office of the Southern Pacific Company.

Mr. GLENSOR.—I will offer these letters in evidence and [36] ask that they be marked Libelant's Exhibits 1 and 2.

(The letters were marked Libelant's Exhibits 1 and 2.)

Q. Now, I show you a document on the letterhead of the Southern Pacific Company, marked "Libelant's Exhibit No. 2 for Identification," contract 1 E. 608, and ask you if you ever saw that document before? A. Yes.

Q. Where?

(Deposition of Glenna De Witt Green.)

A. At the office of the Baldwin Shipping Company.

Q. How did you get it?

A. Received it from Mr. Stubbs' office.

Q. How, by mail? A. By mail.

Q. I invite your attention to the first line, which says, "Confirming phone conversation"; did you have the phone conversation yourself? A. Yes.

Q. Who with, do you know?

A. I believe Mr. Brown.

Q. Do you know who he was?

A. He was representing Mr. Stubbs' office, making bookings for the account of the Southern Pacific Company.

Q. Had you had dealings with him before in that capacity? A. Yes.

Q. Over how long a period of time?

A. Well, I do not just exactly recall; I should say two or three months, perhaps; they changed these booking agents in the Southern Pacific quite frequently.

Q. I call your attention to this document and ask you if you ever saw this before? A. Yes.

Q. Where did you see it?

A. In the office of the Baldwin Shipping Company.

Q. Who wrote it? A. I wrote the letter myself.

Q. What did you do with the original?

A. I sent it to Mr. Stubbs' office, of the Southern Pacific Company.

Q. Did you mail it yourself? A. Yes. [37]

(Deposition of Glenna De Witt Green.)

Q. Was that letter written after receipt of the letter marked "Libelant's Exhibit 2 for Identification"? A. Yes.

Q. It was in reply to it: Is that the idea?

A. Yes, it was acknowledging that letter.

Mr. GLENSOR.—I offer in evidence these two letters, and ask that they be marked "Libelant's Exhibit 3" and "Libelant's Exhibit 4" in evidence.

(The letters were marked Libelant's Exhibits 3 and 4.)

Q. Now, I show you a carbon copy of a letter on the letterhead of the Southern Pacific Company, marked "1 E. Iron and Steel Contract 613," also marked "Libelant's Exhibit 3 for Identification," and ask you if you ever saw that before?

A. Yes.

Q. Where?

A. In the office of the Baldwin Shipping Company.

Q. Where did you get it?

A. It was sent to the Baldwin Shipping Company by Mr. Stubbs' office.

Q. By mail? A. Yes.

Q. I now show you this document and ask you if you ever saw that before? A. Yes.

Q. It purports to be a carbon copy of a letter addressed to Mr. J. G. Stubbs, dated June 28, 1917; did you ever see that before? A. Yes.

Q. Where?

A. In the office of the Baldwin Shipping Company.

(Deposition of Glenna De Witt Green.)

Q. Do you know who wrote the original letter of which that is a copy? A. I did.

Q. Who signed it? A. I did.

Q. Who mailed it? A. I did.

Q. Who did you mail it to?

A. To Mr. Stubbs, of the Southern Pacific Company.

Q. The person whose name and address it bears?

A. Yes.

Q. Did you mail it before or after the receipt of this other [38] letter marked "Exhibit 3 for Identification"? A. Before.

Q. Before? A. Yes.

Q. I call your attention to the first line, which says, "This will confirm telephone conversation with your Mr. Brown"; do you know who held that conversation with Mr. Brown? A. I did.

Q. Where?

A. In the office of the Baldwin Shipping Company, over the telephone.

Q. Where was Mr. Brown? You don't know where Mr. Brown was—he was on the other end of the phone?

A. He was on the other end of the phone, apparently at the Southern Pacific Company.

Q. Did you call him, or he call you?

A. I believe Mr. Brown called me.

Q. Did you have one or more conversations with Mr. Brown? A. More than one.

Q. In regard to this transaction I mean, of course.

A. Yes.

(Deposition of Glenna De Witt Green.)

Q. Where was the other? You say you had more than one. Where was the other conversation?

A. In the office, over the phone.

Q. Were all your conversations with Mr. Brown over the phone?

A. Yes, with the exception of one.

Q. Where did that one take place?

A. In the office of the Baldwin Shipping Company.

Q. Did Mr. Brown call there? A. Yes.

Q. Did all of these conversations to which you have just testified with Mr. Brown relate to this transaction covered by these two letters, that is, the booking of 2,500 tons of iron and steel articles in-excessive sizes for Kobe and Yokohama? A. Yes.

Q. Fix the first conversation, in point of time, that you had with Mr. Brown in regard to the transaction, and say what [39] was said by Mr. Brown and what was said by you.

A. Well, I telephoned the Southern Pacific Company, asking for Mr. Brown, and offered him these 2,500 tons of iron and steel articles for booking to Japan, and he said "All right," he would let me know if he could book them for me.

Q. That was your first conversation?

A. That was our first conversation; that was the usual method of procedure.

Q. When was your next conversation?

A. Well, later on, I don't know whether it was the same day, or the next day—it took, I think, about three days before he was finally successful in

(Deposition of Glenna De Witt Green.)

placing the booking, and he seemed to have a hard time, as it were, getting this space; finally, he came in and asked about the iron and steel, was it in-excessive sizes, were there any excessive sizes in the shipment, and I told him, no, they were not inexcessive sizes, so then he told me that he thought he would be able to book it, and he went out and in about a couple of hours later on the same day he advised me that he had made the booking.

Q. Advising you how, by phone?

A. Over the phone.

Q. What did he say?

A. He said he had booked that 2,500 tons of iron and steel for us, and I asked him on what steamer, and what company, and he told me that he could not tell me that, but that he guaranteed that it was an A—No. 1 steamship line, operating steamers carrying the highest rate of insurance.

Q. That is, the lowest premium? A. Yes.

Q. And the highest class of insurance?

A. I mean the highest class of insurance.

Q. Then what occurred with reference to these letters, if anything?

A. Then immediately, as soon as they would phone that [40] they had made a booking, I would confirm that telephone conversation.

Q. What did you do in this particular case?

A. That is what I did in this instance, confirmed it by letter.

Q. By the letter there? A. Yes.

Q. You mailed the original? A. Yes.

(Deposition of Glenna De Witt Green.)

Q. When I said "that letter," I mean this letter of June 28, 1917, addressed to Mr. Stubbs. That is the one you sent? A. Yes.

Q. When did you receive this one here that is marked "Libelant's Exhibit 3 for Identification"?

A. Well, the next day, I believe.

Mr. GLENSOR.—I will offer these two documents in evidence as Libelant's Exhibits 5 and 6.

(The letters were marked Libelant's Exhibits Nos. 5 and 6.)

Q. Mrs. Green, were any of these article brought to San Francisco? A. Yes, all of them.

Q. Were any of them moved in this space that was booked by the Southern Pacific Company?

A. I do not think so.

Q. That would be a matter of looking up the records of the Baldwin Shipping Company before you could testify to that? A. Yes.

Mr. GLENSOR.—That is all.

Cross-examination.

Mr. FORD.—Q. Mrs. Green, are you speaking of your own knowledge when you say these articles came to San Francisco? A. Yes.

Q. Did you see them? A. I traced all the cars.

Q. Did you see the shipments?

A. The bills of lading covering them. [41]

Q. I mean, did you see the shipments, not the bills of lading? A. No.

Q. Naturally, you saw the bills of lading?

A. Yes.

Q. You did not have anything to do with seeing

(Deposition of Glenna De Witt Green.)

the articles themselves? A. Why, no.

Q. When you say you wrote, signed and mailed these letters, which you have mentioned, are you giving your recollection in each particular instance that you wrote, signed and mailed the letters? You handled a great many transactions, didn't you?

A. Yes.

Q. Did you make it a practice to mail the letters yourself? A. I did, at that time.

Q. Why in this particular instance, as compared with any other? A. I mailed all of my letters.

Q. You mailed all the letters; you mean you took them out and put them in the box? A. Yes.

Q. When you say you wrote them, do you mean you dictated them, or did you write them yourself?

A. I wrote them myself, because I was the only one in the office.

Q. Who was the general manager during the period you have been discussing here, referring to June, 1917? A. J. H. Simmons.

Q. Were you doing this under Mr. Simmons' directions, or yourself, personally?

A. Mr. Simmons was out of town.

Q. He was not here at that time? A. No.

Q. So you were in charge?

A. Yes, of the office.

Q. How long was Mr. Simmons gone?

A. I do not exactly recall; I think about a month.

Q. Was this the usual procedure when you were asked for this space? A. Yes. [42]

Q. Was it your habit to ask the Southern Pacific

(Deposition of Glenna De Witt Green.)

to book the space for you? A. It was.

Q. How long a time had that been your practice?

A. I think it was the practice for years.

Q. Was there anything unusual about this particular instance or had you previously been given the names of the vessels on which the bookings would be made?

A. No. These were the first bookings that the Baldwin Shipping Company had ever made through the Southern Pacific Company.

Mr. FORD.—Mr. Reporter, will you read back the last three or four questions and answers?

(The record was here read by the reporter.)

A. I mean it was the practice of the forwarding agents and the exporters to call the various railroads and offer them this cargo.

Q. Mrs. Green, I am not asking you what the practice of the exporters and importers was; I am asking you, in this particular position you were in, had that been your practice previously, to call up someone in the Southern Pacific and ask for these bookings, or had it not been?

A. Well, this was the first time we had ever done it.

Q. That is what I was asking you before. You understand, I am a sort of a rank outsider; I do not understand this matter at all, and your testimony is going to be used against us in court, and I want you to be careful what you say. This was your first experience?

A. My first experience, yes.

(Deposition of Glenna De Witt Green.)

Q. I notice in the letter from your company to the Southern Pacific Company there is nothing said about—that they are unable to divulge to you the name of the steamer, etc., but that is contained in your letters. You say you gathered [43] that information from a conversation that you had with Mr. Brown? A. Yes.

Q. He told you he was unable to divulge that?

A. Yes.

Q. Did he tell you why?

A. No, he did not tell us why, at all.

Q. Did you know why? A. No, I did not.

Q. Do you recognize this Exhibit 3? A. Yes.

Q. Where did you see that before?

A. In the office of the Baldwin Shipping Company.

Q. Did that refer to any of these contracts?

A. It did; it referred to the booking of 2,500 tons of iron and steel articles which they had made for our account—which the Southern Pacific Company had made for our account.

Q. This told you what they had done, did it not?

A. Yes.

Q. How did you happen to have that letter in your files?

A. The Southern Pacific Company sent it to us.

Q. Did that give you the information you desired, or did it not? A. No, it did not.

Q. You knew what the Southern Pacific Company had done, did you?

A. When I received that letter.

(Deposition of Glenna De Witt Green.)

Q. And that letter was received on or about June 28, 1917? A. About that time, yes.

Q. What did you do when you received this letter of June 28, 1917, addressed to Messrs. C. R. Haley & Co., by Mr. Stubbs?

A. I simply kept it as a matter of record.

Q. Did you do anything about determining where this space had been reserved—what Mr. Haley had done?

A. No, because we booked directly with the Southern Pacific Company and when we made this booking we did not know where the Southern Pacific Company were placing the booking. We proceeded directly with the company. [44]

Q. When you got this letter, I am referring to.

A. Did I take any proceedings?

Q. Yes. A. No, I did not.

Q. The fact of the matter is, some of these letters of yours were written on advice, were they not?

A. How do you mean?

Q. Weren't they written on the advice of an attorney? A. Positively not.

Q. Was there any of the correspondence with the Southern Pacific Company written on the advice of any attorney? A. None of these letters.

Q. Any letters? A. Not that I know of.

Q. Were you ever advised concerning any correspondence? A. Positively not.

Q. This is simply your own procedure?

A. My own procedure under instructions of our general manager.

(Deposition of Glenna De Witt Green.)

Q. Did I understand you— I think you said the general manager was not there.

A. When he was there, I was acting under instructions from him, as to how to make these bookings.

Q. Did you understand, when you got this letter of June 28th that that was what had been done as to this space that you had asked to have booked?

A. From that letter, naturally.

Q. You simply put the letter in your files?

A. Yes, and waited until the general manager returned and showed it to him.

Q. Did you know who C. R. Haley & Co. were?

A. I did not know them at that time at all.

Q. How long after that did your general manager return?

A. I think he was gone about a month, as I said before; I do not recall when Mr. Simmons returned.

Q. Did you receive the same form letter as this one I have shown you, Exhibit 3, as to each of these shipments? [45]

A. No, I don't think we did. That was the first one we received, I think.

Q. When you received that one, did you make any inquiry of Mr. Brown, or whomsoever you were dealing with, as to the method of procedure he had followed in each case?

A. No, I did not, because, as I said, I simply took that letter as a matter of record, and put it on file and showed it to the general manager, as that was something for him to transact, and not for me. I

(Deposition of Glenna De Witt Green.)

was simply instructed to make the bookings.

Q. Had you booked any ocean space before that?

A. Yes.

Q. I mean before this transaction with the Southern Pacific Company, had you made any bookings before that, yourself? A. I do not think so.

Q. You answered a moment ago that this was the first transaction you had with the Southern Pacific.

A. Whether our office had made a couple of minor bookings with the Southern Pacific, I do not recall, but these were the first large bookings that I had ever handled; if Mr. Simmons had made any I would not be cognizant of it.

Q. You don't know anything about when this freight arrived in San Francisco, that is mentioned here?

A. Other than for clearance—it was booked for clearance during certain periods.

Q. But you don't know of your own knowledge when it arrived? A. Sometime around in August.

Mr. GLENSOR.—Q. Mrs. Green, as this freight arrived, carload by carload, the railroad companies would send you notice of its arrival, would they not?

A. Yes.

Q. You kept copies of the bills of lading?

A. Yes.

Q. And those arrivals are, so far as you know, of record [46] in the office of the Baldwin Shipping Company, and also in the Southern Pacific?

A. Yes.

Mr. GLENSOR.—That is all.

Mr. FORD.—That is all. [47]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Monday, June 28, 1920, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of H. W. Glensor, Esq., in the Mills Building, in the City and County of San Francisco, State of California, personally appeared Glenna De Witt Green, a witness called on behalf of the libelant, and H. W. Glensor, Esq., appeared as proctor for the libelant, and George Ford, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by her deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

Accompanying said deposition and referred to and specified therein are Libelant's Exhibits 1 to 6, inclusive.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands

to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor [48] attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 6th day of July, 1920.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Aug. 19, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [49]

In the District Court of the United States for the Southern Division of the Northern District of California, First Division.

No. 16,755.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent.

(Deposition of John Gray Stubbs, Taken on Behalf of Libelant.)

BE IT REMEMBERED: That on Wednesday, June 16, 1920, pursuant to stipulation of counsel hereunto annexed, at the offices of H. W. Glensor, Esq., in the Mills Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., JOHN GRAY STUBBS, a witness called on behalf of the libelant.

H. W. Glensor, Esq., appeared as proctor for the libelant, and George Ford, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant at the office of H. W. Glensor, Esq., in the Mills Building, in the City and County of San Francisco, State of [50] California, on Wednesday, June 16, 1920, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written up, may be read in evidence by either party

(Deposition of John Gray Stubbs.)

on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.) [51]

JOHN GRAY STUBBS, called for the libelant, sworn.

Mr. GLENSOR.—Q. Mr. Stubbs, where do you reside?

A. My business address is at San Francisco; my residence is in Oakland.

Q. What is your business?

A. I am traffic manager for the Java, China, Japan line and employed by J. D. Spreckles & Brothers Company, who are the general agents for that line.

Q. Were you ever employed by the Southern Pacific Company? A. Yes.

Q. In what capacity?

A. In various clerical capacities, finally as General Freight Agent, with headquarters at San Francisco.

Q. Were you the General Freight Agent for that company during the year 1917?

A. Yes, from 1915 to February, 1919, at San Francisco.

(Deposition of John Gray Stubbs.)

Q. As General Freight Agent the movement of freight of all classes came under your jurisdiction, did it not?

A. Well, I can hardly say that my jurisdiction was quite as broad as that.

Q. The movement of freight from a commercial point of view came under your jurisdiction, did it not?

A. Only within certain very definite limits. Perhaps I might elaborate on that a little.

Q. I wish you would.

A. The Southern Pacific Company, Pacific System, has three General Freight Agents, one at Portland, with jurisdiction in Oregon, one at San Francisco, with jurisdiction in California, north of Santa Barbara and Mohave, and including Nevada and Utah, and one at Los Angeles, with [52] jurisdiction west of El Paso and south of Mohave and Santa Barbara. Now those three General Freight Agents while directly in charge of their immediate territories were of course subject to the jurisdiction of their superior officers of the traffic department, the Assistant Traffic Manager and the Traffic Manager at San Francisco.

Q. Who was the Freight Traffic Manager at San Francisco at that date? A. G. W. Luce.

Q. G. W. Luce? A. Yes.

Q. The matter of securing freight traffic came under your jurisdiction and was a part of your activities, was it not?

(Deposition of John Gray Stubbs.)

A. Solicitation was a part of my duties and activities; yes.

Q. And as a matter of fact, you used to as a practice, if you would get information of any freight for movement from a point in the east outside of your own particular territory to a point in your territory or for export through this port, you got behind that and tried to secure the freight for your line, did you not?

A. We always solicited that competitive business, yes.

Q. You had as a part of your organization, of your particular office, what was known as an export department, didn't you, or an export desk?

A. Yes.

Q. Was that also known as the shipping desk or did you have another department for the shipping desk?

A. No, that was generally referred to in our office as the foreign desk.

Q. The foreign desk?

A. It was a part of the general freight office but known in the office as the foreign desk.

Q. Just a colloquial method of designating that particular desk; is that it? A. Yes. [53]

Q. That was a part of your own office, was it not, over which you had jurisdiction?

A. That so-called import or export or foreign desk was more immediately and particularly under my jurisdiction.

Q. Now, the matter of handling freight traffic

(Deposition of John Gray Stubbs.)

that originated at points either in or east of your territory that cleared and was delivered to ships through this port was handled over that desk, was it not?

A. They handled the detail of that work, yes.

Q. Now, did you have a man under you in your employ during that time by the name of L. F. Boyson? A. Yes.

Q. What was his position?

A. He was a clerk on that desk and my recollection is that for a few months he was at the head of the desk; the precise period I cannot give you.

Q. Did you also have a man in your employ by the name of J. M. Hoffer?

A. I don't recall that name.

Q. You have no recollection of Mr. Hoffer?

A. I do not place him.

Q. Now, as a matter of practice, Mr. Stubbs, in securing the movement of freight from eastern points to this port for trans-Pacific shipment, how was that handled over that desk; what was the routine?

A. We had solicitors on the street in San Francisco, we also had solicitors in various cities in the eastern part of the United States, the more important cities, Chicago, Pittsburg, New York and places like that who were constantly making the round of firms who were known to be shipping either domestic business or foreign business; those shippers were called on for the purpose of soliciting the routing of the business over the Southern Pa-

(Deposition of John Gray Stubbs.)

cific lines, and with respect to export business those solicitors in the course of that solicitation [54] would—I speak now of the eastern solicitors more particularly—wire out to our General Freight office in San Francisco to obtain space, that is, ocean space, the ocean rate for a given quantity of tonnage that might be offered to them; the men on the foreign desk, either directly themselves or through the solicitors on the street would make inquiries of various steamship companies, would ascertain from them if they could book these various shipments that were offered; if so for what clearance and at what rate; in other words the usual details; that information would be wired back to the commercial agent or solicitor in the east, and if the space and rate was accepted a confirmation would be sent to us and we would exchange or were supposed to exchange a confirmation with the steamship company for that space and at the rate quoted for that particular shipment. That was the ordinary detail and routine of handling it.

Q. When you say that we were supposed to send a confirmation, you mean the Southern Pacific Company, do you? A. Yes.

Q. Now, the matter of securing this space from the steamer and confirming it to the eastern agent or to the shipper, as the case might be, was handled by the foreign desk, was it not? A. Yes.

Q. The man on the foreign desk?

A. There were several of them on that desk.

(Deposition of John Gray Stubbs.)

Q. Without referring it in each instance to you for specific authority?

A. We considered that the ordinary routine business and as a rule those bookings, so called, did not come under my personal eye unless the man who was handling it should feel that there was something in connection with it that required my advice or my authority before he closed it up. [55]

Q. The usual and customary and routine method was for these things to be handled without your knowing about the individual item or case?

A. That is correct; yes.

Q. Now, the idea in making these bookings for ocean space for these shippers was to secure the movement of the freight over your line into San Francisco, was it not? A. Yes.

Q. Now, I will show you a document purporting to be a letter on the letter-head of the Southern Pacific Company, Pacific System and ask you if you recognize it or if you have seen it?

A. I cannot answer that question positively. I have some recollection of correspondence in the General Freight Office when I was in the Southern Pacific employ with reference to contract 607 and 608 on account of the Baldwin Shipping Company, but as to the precise details of those contracts I do not recollect, and while it is quite likely that in that correspondence I had occasion to and did see that particular letter, I cannot swear positively to the fact.

Q. I understand that. Now you, however, have

(Deposition of John Gray Stubbs.)

an independent recollection that there was a contract, 607, in the Southern Pacific office relating to the Baldwin Shipping Company?

A. Yes. That recollection if I may say comes about in this way, that in the congestion of export freight in the latter part of 1917 I had, so far as the Southern Pacific Company was concerned the task of clearing up that congestion, trying to get rid of it from the port, and I had made up a list of the export freight that he had on hand, who it belonged to and the details concerning it, and why it was not cleared; and I recall in that list contract 607 and 608 on account of the Baldwin Shipping Company. That is the reason those numbers [56] have stuck in my mind.

Q. Did you read that letter that I just showed you? A. Yes.

Q. After reading it do you recognize the signature?

A. It looks to me like Boyson's signature.

Q. Over your name? A. Over my name.

Q. Which was a customary routine method of handling these transactions?

A. These letters were always sent out over my name as General Freight Agent or over Mr. Luce's name as Freight Traffic Manager; the two names were used indiscriminately, and the clerk who dictated and signed the letter put his initials under the name of Stubbs or Luce as the case might be.

Q. That is apparently Boyson's?

A. I think those are Boyson's initials, and his

(Deposition of John Gray Stubbs.)

signature, according to my recollection.

Mr. GLENSOR.—I will ask the reporter to please mark this for identification, "Libelant's Exhibit 1 for Identification."

The letter is marked "Libelant's Exhibit 1 for Identification."

Q. Now, I will show you a carbon copy of a document purporting to be a letter and ask you if you have any recollection of ever having seen that?

A. I have no recollection of having see that letter.

Q. That letter, in fact, all letters received pertaining to contract 607 would be filed under contract 607, in the foreign department of the Southern Pacific General Freight office, would it not?

A. A letter like that when received would go directly to the foreign desk and they would attach it to their file of contract 607.

Q. Now, I will ask you to look at this document?

A. I cannot say positively that I have seen that letter before [57] but my recollection is that I have, that is the carbon copy of it in the files of the Southern Pacific Company.

Q. Will you look at the signature there and see if you can say what it is?

A. My recollection is that those are Boyson's initials.

Q. And signed apparently in the same manner as 607? A. Yes.

Mr. GLENSOR.—I will ask that that be marked for identification "Libelant's Exhibit 2."

(Deposition of John Gray Stubbs.)

The letter is marked "Libelant's Exhibit 2 for Identification."

Q. Other than that have you any recollection of any of the facts relating to these contracts 607 and 608?

A. I have no recollection whatever as to the manner in which the bookings were negotiated in the first place by the foreign desk or as to the subsequent disposition of the freight itself.

Q. Now, was there a man by the name of Brown on the foreign desk?

A. Yes, Spencer Brown; initials S. W. Brown is my recollection; he was at one time the head of the foreign desk.

Q. Do you remember at what time he was?

A. I could not give you the date.

Q. I will ask you to kindly refer to a carbon copy of a letter marked "Contract 613" and ask you to read it.

A. I have seen that letter before, that is to say the filed copy of is in the Southern Pacific records.

Q. Do you know by whom it was written?

A. No.

Q. But you have seen a filed copy of it in the Southern Pacific records?

A. My recollection is that I have, yes.

Q. There is no doubt in your mind that it emanated from the [58] Southern Pacific office, is there?

A. Nothing to indicate to me but what it is a *bona fide* communication.

(Deposition of John Gray Stubbs.)

Q. I invite your attention to the fact that it is addressed to Messrs. C. R. Haley & Company. Do you know who Messrs. C. R. Haley & Company were?

A. Well, I don't know a great deal about them.

Q. Do you know what business they were engaged in?

A. Mr. C. R. Haley at that time I believe was handling shipments of refined oil from the east as an agent for some Eastern concern, that was a domestic business; and along with that he was what I would term a freight forwarder or broker in the export business; that is he secured space from steamship companies and in turn sold that space to people who wanted to take advantage of it.

Q. Now, at the time this letter bears date, June 28, 1917, you knew what business Mr. Haley was in, did you not? A. At that time?

Q. Yes. A. Yes.

Q. I also invite your attention to the notation on the bottom, C. C. Baldwin Shipping Company, 433 Sutter, and the check mark in blue pencil thereon, and I would ask you to please say from your knowledge of the routine methods of procedure in the Southern Pacific office what that indicates.

A. That would indicate that a carbon copy of the original letter to Haley & Company was to be sent to the Baldwin Shipping Company, and that blueprint mark would indicate that this particular car-

(Deposition of John Gray Stubbs.)

bon was the one for the mailing desk to send to the Baldwin Shipping Company.

Q. Mr. Stubbs, I invite your attention to the fact that contract 607, the first one you referred to, calls for the [59] clearance of 750 tons of tinplate a month for September, October, November and December, 1917. You said in your previous testimony that you were given the job of clearing up this stuff and getting it out. Of your own knowledge, as a matter of fact, do you know that these 750 tons of tinplate per month for those four months did not clear during the month for which they were booked?

A. My recollection is that they did not.

Q. Now, I invite your attention to the fact that contract 608 calls for the clearance of 2,000 tons of pig iron and steel articles in excessive sizes for Japan, late July, August and September clearance; it does not say clearance, but you understand that is what it meant by this, do you not? A. Yes.

Q. Have you an independent recollection or knowledge of the fact whether that 2,000 tons of pig-iron and steel articles in excessive sizes cleared during that time?

A. My recollection is that it did not.

Q. Now, I invite your attention to the fact that contract 613 relates to 2,500 tons of pig-iron and steel articles for August and December clearance for Kobe and Yokohama, $15 weight or measurement, ship option; you would understand by that contract in the parlance of a freight traffic man,

(Deposition of John Gray Stubbs.)

that that means a clearance between August and December, would you not? A. Yes.

Q. Do you know whether that commodity cleared during the time specified, August and December, 1917?

A. I cannot say positively, but my recollection is that it did not.

Q. You recall as a matter of fact that all of the commodities mentioned in those three contracts cleared after the end of the year 1917, do you not?

A. That I cannot say. In the [60] first place I don't know how much was brought to San Francisco under these contracts and the details as to the ultimate clearance of such as was brought here, I have no recollection, precisely.

Q. In the course of the correspondence which you referred to and which took place in connection with the attempted clearance of this stuff or your efforts to clear it, you recall that the Baldwin Shipping Company notified you that they would be obliged to pay a much higher rate than these contracts called for in order to clear the stuff?

A. Mr. Glensor, I do not want to dodge, but—

Q. (Interrupting.) If you have no recollection you can say so. I understand.

A. I absolutely have no recollection of the details of these contracts or of the handling of the shipments that were made under them.

Mr. GLENSOR.—That is all.

Mr. FORD.—No questions. [61]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Wednesday, June 16, 1920, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of H. W. Glensor, Esq., in the Mills Building, in the City and County of San Francisco, State of California, personally appeared John Gray Stubbs, a witness called on behalf of the libelant in the cause entitled in the caption hereof; and H. W. Glensor, Esq., appeared as proctor for the libelant, and George Ford, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause, deposed and said, as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the clerk of the United States District Court for the Southern Division of the Northern District of

California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption [62] named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 18th day of June, 1920.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Aug. 19, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [63]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

Before Hon. M. T. DOOLING, Judge.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent.

(Testimony Taken in Open Court.)

Thursday, August 19, 1920.

Counsel Appearing:

For the Libelant: H. W. GLENSOR, Esq.

For the Respondent: GEORGE FORD, Esq.

Mr. FORD.—We have here a slight amendment to our answer. Have you read that, Mr. Glensor?

Mr. GLENSOR.—Yes, I have read it.

Mr. FORD.—Any objection to it?

Mr. GLENSOR.—It seems to me that it is immaterial. I suppose if it is immaterial it can do no harm to file it.

The COURT.—Very well; that is my view of it.

Mr. GLENSOR.—I think this case should be disposed of very briefly. It is merely a question of liability; we are not prepared to fix damages; we expect to fix those before a commissioner if the libelee is held liable.

This is a libel by the Baldwin Shipping Company, an Illinois Corporation, against the Southern Pacific Company, a Corporation. [64] Mr. Ford, will you admit that the Baldwin Shipping Company is an Illinois corporation?

Mr. FORD.—Yes.

Mr. GLENSOR.—The testimony of libelant has been taken in depositions, largely, which depositions are here on file, and I will offer them in evidence, and with your Honor's permission I will comment briefly on them.

The COURT.—Is there any further testimony to be offered?

Mr. GLENSOR.—On behalf of libelant, I think not.

Mr. FORD.—Before going into that matter, let us see what we can stipulate to as to the defense.

Mr. GLENSOR.—Yes.

Mr. FORD.—These are matters that we will be prepared to prove unless stipulated to. The libel simply alleges that the Southern Pacific Company is a corporation. We desire to have an admission that it is a corporation engaged in interstate commerce, carrying freight and passengers within the United States.

Mr. GLENSOR.—It will be so admitted.

Mr. FORD.—And it will also be admitted, I understand—by the way, there are three counts in this libel, one for the shipment of 2,000 tons of pig iron and steel articles from San Francisco to some port in Japan or China, another of 2,500 tons of pig iron and steel articles between the same points, and another of 750 tons of tinplate.

The COURT.—They all involve the same question, do they?

Mr. FORD.—Yes, and the shipments were all to be made during the latter part of 1917. I understand that it will be admitted that the plaintiff, Baldwin Shipping Company, requested the Southern Pacific Company to engage this space for it; that it will [65] be admitted also that the Southern Pacific Company did engage this space from C. B. Haley & Company, who at that time were engaged in business here in San Francisco in forwarding freight, and that C. B. Haley & Company

agreed to take this amount of freight between these points at the time stated, and at a certain rate which was agreed upon.

The COURT.—I would understand it much better if I knew what was involved in the case.

Mr. GLENSOR.—I think if you will withhold that request for a moment, I will go a little further with my statement. The depositions which I am about to place before your Honor, I will refer to briefly with your Honor's permission. One is the deposition of John Gray Stubbs, who is the freight—

The COURT.—What are the facts in issue?

Mr. GLENSOR.—The facts in issue are these, that the Southern Pacific agreed to carry certain freight under these contracts during the time covered by the contract. The counts in the libel are based on three bookings, what steamship men call firm bookings for freight from San Francisco to various points in the Orient. One of them is dated June 22, 1917, and is in the form of a letter from the Southern Pacific Company to the Baldwin Shipping Company, reading as follows:

"Referring to our phone conversation, we have booked for your account 750 tons of tinplate a month for September, October, November and December, to Shanghai at $16 per ton, weight and measurement, ship's option.

"This will be covered by Southern Pacific Contract No. 607.

"Kindly confirm in writing.

"Yours truly,

"J. G. STUBBS."

The deposition shows that J. G. Stubbs was the general freight agent for the libelee in San Francisco at that time. [66] To which the Baldwin Shipping Company replied as follows, under date of June 26th, four days later:

"This will acknowledge receipt of your letter of June 22nd, file 1—E—Contract No. 607, booking for the account of the Baldwin Shipping Company, 750 tons tinplate per month, September, October, November and December, 1917, at ocean rate of $16 per ton, weight or measurement, ship's option—destined Shanghai and covered by your contract No. 607.

"You have advised us that at the present time you cannot inform us the name of line with which you have booked this 3000 tons of tinplate, but guarantee to clear on first-class steamers carrying lowest rate of insurance, and to protect the above rate—this is agreeable to us, however, at the earliest possible date let us know with whom you have booked this business, so that we can give instructions to our New York office, relative issuance of the bills of lading.

"We will keep you advised of the forwarding of this business from the mills, and, if we can assist you in any way, do not fail to let us know."

The next contract is No. 608, and is the same date, June 22, 1917, and reads as follows:

"Baldwin Shipping Company"—

Mr. FORD.—Just the same as the other except that it covers 2,000 tons of pig iron and steel articles.

The COURT.—It is understood all the counts are the same, as far as questions of law are concerned, whatever applies to one applies to the other.

Mr. GLENSOR.—That was acknowledged by a letter identically in form and language—

The COURT.—There is the same question involved in all three [67] cases, and if you confine yourself to one it will be better.

Mr. GLENSOR.—It was testified to and appears in the depositions that the name of the line with whom these bookings were made was requested by the Baldwin Shipping Company from the Southern Pacific Company and they declined to give it. That appears specifically with reference to one contract, and it will be admitted with regard to the other two, Mr. Ford?

Mr. FORD.—No; we will claim that the Baldwin Shipping Company knew from the start where the goods were to be shipped.

The COURT.—Over what line?

Mr. FORD.—Yes. Your Honor, during this period the evidence will show—

The COURT.—What is the object of this suit, that is what I would like to know before I go further.

Mr. GLENSOR.—The object is this: The commodities did not clear under these bookings, the Southern Pacific did not protect the ocean space, and the Baldwin Shipping Company was obliged to ship by other lines at higher freight rates, and this action is to recover damages.

The COURT.—I understand.

Mr. GLENSOR.—If that is not admitted, I will have to—

Mr. FORD.—If what is not admitted?

Mr. GLENSOR.—That the railroad company did not advise the Baldwin Shipping Company, with whom they booked this freight.

Mr. FORD.—Mr. Glensor, you will find that the railroad company has sent your company a copy of the letter addressed to C. R. Haley & Company.

Mr. GLENSOR.—In one case.

Mr. FORD.—I cannot admit that they did not notify them, because we will prove that they did know. [68]

The COURT.—Is it your defense that you complied with the contract?

Mr. FORD.—Our defense is we did not agree to ship this at all, we simply acted as the representative of the Baldwin Shipping Company in engaging the space; that under the law we could not agree to ship. Now, the complaint here is based upon the proposition that we agreed to make these shipments between San Francisco and these ports.

The COURT.—Your claim is there was no contract, and, secondly, if there was a contract, it was void.

Mr. FORD.—Yes, I presume it will be admitted as to each of these matters that we did engage space from C. R. Haley & Co., and C. R. Haley & Co. confirmed our engagements of space, but as I understand it, Mr. Glensor claims that was not a compliance with our agreement with the Baldwin Shipping Company.

Mr. GLENSOR.—That is it; in other words, that this agreement of theirs which I have just read to the Court, was not an agreement merely to engage space, which could be fulfilled by their engaging space, but was to protect the movement of this stuff. These bookings have been sustained by courts of admiralty on innumerable occasions, and if the commodity was not delivered to the ship the shipper has been compelled to pay freight on it.

The COURT.—To what extent do you differ over the facts? Only to the extent that you claim that they did not notify you?

Mr. GLENSOR.—We claim that they did not notify us with whom they had booked this freight, and, therefore, they cannot be now allowed to say that they booked it as our agent.

The COURT.—Is that the only disputed question of fact?

Mr. GLENSOR.—Yes.

The COURT.—Proceed with the testimony on that point, then. [69]

Mr. FORD.—I have not quite finished with the stipulations we want. The stipulation that I want is that the Southern Pacific Company was engaged in interstate commerce during the period in question, and I desire to further stipulate that the Southern Pacific Company had not, during any of those times, filed with the Interstate Commerce Commission any schedule of rates between San Francisco and these ports in China and Japan, or between any Pacific Coast ports and these ports in Japan and China, and it was not at that time oper-

ating any steamship line between those ports. Those are the facts and can be proved, but I understand that they will be stipulated to.

Mr. GLENSOR.—I cannot admit that they were not operating these steamship lines, although I do not know that they were; but the Southern Pacific Company does operate steamships on the other coast, and other railroads have, under these conditions, chartered steamers from them to protect these contracts. I am willing to admit that they had not filed any tariff with the Interstate Commerce Commission; I will admit that for what it is worth, but it seems it is wholly immaterial.

The COURT.—Get all the facts; that is all I care for now.

Testimony of Glenna De Witt Green, for Libelant.

GLENNA DE WITT GREEN, called for libelant, sworn.

Mr. GLENSOR.—Q. You have given your deposition already in this matter, touching some phases of it? A. Yes.

Q. You were the secretary to the general manager of the Baldwin Shipping Company, in San Francisco, were you not? A. Yes.

Q. And you actually handled the transactions surrounding the making of the three bookings covered by the Southern Pacific contracts 607, 608 and 613, did you not? A. Yes, I did. [70]

Q. You wrote the letters confirming those contracts, did you not? A. I did.

Q. I call your attention to the language in each

(Testimony of Glenna De Witt Green.)

of the letters acknowledging the contract, "You have advised us that at the present time you cannot inform us of the name of line with which you have booked this 3,000 tons of tinplate," or whatever was covered by the contract in question, and I would ask you if the Southern Pacific Company at any time advised you, or if you had knowledge of the line with which the Southern Pacific Company had booked the freight in question?

A. No, I did not.

Q. Did you ever request this information from the Southern Pacific Company?

A. I did. I asked them with what line they had booked the freight, and the gentleman who did the talking informed me that he did not know at that time that it was a steamer carrying the lowest rate of ocean insurance, and No. A–1.

Q. Over what period of time did you make requests for this information?

A. During all the time I booked freight—every time I booked any freight with the Southern Pacific Company I asked them for that information.

Q. I call your attention to the fact that one of these contracts, or one of the letters which is written by the Southern Pacific Company to C. R. Haley, a carbon copy of which was sent to you—that was the contract which in your deposition you testified you made verbally with Mr. Brown, and was confirmed in the manner I have just indicated—contract 613. I note in that that you make the same request, that they advise you of the name of the

(Testimony of Glenna De Witt Green.)

steamer line on which they have booked those 2,500 tons, so that you could instruct the New York office with regard to the issuance of bills of lading. Did you know what C. R. Haley's business was, or anything about it?

A. I knew C. R. Haley was in [71] business here, but I knew nothing about him.

Q. You still in that letter wanted to know the name of the line or the steamer on which this freight was to move, did you not? A. Certainly.

Mr. GLENSOR.—That is all.

Cross-examination.

Mr. FORD.—I call your attention to the fact that these books were made all in the latter part of June, June 22 and June 28, those three contracts; do you recall that?

A. They were all very close together.

Q. The fact is, according to your letter, they were on June 22, and June 28, two of them made on June 22d and one on June 28th, and as to one of the bookings, a copy of the letter which was sent by the Southern Pacific Company to C. R. Haley was enclosed to you; you recall that, do you not?

A. You mean the last booking?

Q. The last one, of the 28th, yes. A. Yes.

Q. Did you have any conversation with Mr. C. R. Haley following that time? A. No, not at all.

Q. Did Mr. C. R. Haley not call at your office and call you on the telephone on several occasions to find out from you when these goods would be here that were to be shipped during August?

(Testimony of Glenna De Witt Green.)

A. Absolutely not.

Q. He did not? A. No.

Q. You cannot state whether any of these goods were received for that August shipment, or not?

A. I know we notified the Southern Pacific when it was received.

Q. You could not tell when it was they arrived?

A. No.

Q. So whether any of them, arrived, for, Mr. Haley's August shipment, you don't know?

A. I could not tell you now, I would [72] have to look at the date of the arrival.

Q. You know Mr. Haley?

A. I have seen him twice.

Q. Where? A. On the street once.

Q. Never saw him in your office? A. No.

Q. Did you ever talk to him over the telephone?

A. Not on anything connected with this.

Q. I say, did you ever talk to him over the telephone? A. I do not believe I ever did.

Q. You mentioned that one of these arrangements was made by Mr. Brown, of the Southern Pacific Company. A. Yes.

Q. Where was that—over the telephone, or at your office?

A. Over the telephone, and in the office, too.

Q. Do you know Mr. Brown?

A. I saw Mr. Brown once, that is all.

Q. That was the name, Mr. Brown?

A. That was his name.

Q. Do you recognize Mr. Brown? (Will you

(Testimony of Glenna De Witt Green.)

stand up for a moment, Mr. Brown?)

A. I don't know. It has been a long time ago. I was under the impression Mr. Brown was a large short man.

Q. Do you recognize Mr. Boyson? A. No.

Q. You don't recognize him? A. No.

Q. How do you place the name Brown, then?

A. Because I remember Mr. Brown very distinctly.

Q. This letter that was sent to you showing the Southern Pacific engaged this space through C. R. Haley & Co., did that mean anything to you at all?

A. It did not to me, because our manager was in the east, and it was left to me. I was simply booking freight on instructions. That was a matter for him.

Q. You say you were anxious to find out what steamer this was going on.

A. That was because our New York office was calling for that information.

Q. Did you request Mr. Haley to tell you what steamer or when [73] it would sail?

A. No. I had no dealings with Mr. Haley. I had my dealings with the Southern Pacific.

Q. But you say you did request the Southern Pacific? A. Yes, I did.

Q. How, by letter?

A. Over the phone, and by letter also, as these letters indicate there.

Q. In these letters of June 22d, at the time you engaged the space, you see, there, you have not been

(Testimony of Glenna De Witt Green.)

given the name of the steamer, but you recall from the correspondence that a reply was given you in which a copy of the letter from the Southern Pacific Company to Mr. Haley was enclosed to you. Now, then, after that, after the receipt of that letter of June 22d, or June 28th, whatever it may be, did you write the Southern Pacific Company, or call it up and say this letter does not indicate what steamer Mr. Haley is going to send these goods out on?

A. I did not; I had nothing to do with that.

Q. Did you know what business C. R. Haley & Company were engaged in at that time?

A. I knew nothing of C. R. Haley at the time I booked this freight.

Q. When the letter was received by you from the Southern Pacific, addressed to C. R. Haley & Co., was there anything then that indicated to you that they were engaged in the freight forwarding business between here and the Orient?

A. I had heard rumors—I had never heard of anything of C. R. Haley other than that Mr. Haley was a broker.

Q. And engaged in what line of brokerage?

A. I did not know. He handled many lines, I understood.

Q. Many steamship lines, or many what?

A. No, he handled oils and many things in that line.

Q. Was not that a later date that he went into the oil business?

(Testimony of Glenna De Witt Green.)

A. I don't know. It was my impression that Mr. Haley booked most anything he could book. [74]

Q. Your company had done business with Mr. Haley before, had it not? A. No.

Q. After that, did you do any business with Mr. Haley? A. I believe they did later on.

Q. That is, your Mr. Simmons transacted shipping business with Mr. Haley direct?

A. No, through the Southern Pacific.

Q. Not any business directly with him, so far as you know? A. Not so far as I know.

Q. Do you recall some freight that was to be sent out on the "Zealandia" by your company through Mr. Haley? A. No, I do not.

Q. Do you recall Mr. Haley talking with you about that, and wanting to get the time when your freight would arrive? A. No.

Q. And telling you unless he was able to fulfill the contract with the "Zealandia" that contract would be cancelled? A. No.

Q. Was there another lady in your office during that period? A. Yes, I had a stenographer there.

Q. Did she transact that class of business, or did you do that alone?

A. I handled it when Mr. Simmons was not there. They came in when I was out of the office, because I was on the street a great part of the time myself.

Q. In June, 1917, was Mr. Simmons, who was your superior in the Baldwin Shipping Company, there or out of town? A. He was out of town.

(Testimony of Glenna De Witt Green.)

Q. Do you remember what period he was out?

A. During the period I booked this freight.

Q. Was he in the office, say in August or July, when some of this freight was to come out?

A. Yes, Mr. Simmons just made short trips out of the city, either to New York or to Seattle; he was never gone for any great length of time.

Q. Did you know whether any request was made of Mr. Simmons as [75] to when these cars of freight would be ready to go out on the "Zealandia," or any of these other boats?

A. No, I do not recall the "Zealandia" at all.

Q. Mrs. Green, the fact of the matter is that you were handling these matters simply because of Mr. Simmons' absence?

A. I have handled them when he was there, too.

Q. You were handling them when he was there, too? A. Yes.

Q. But who, for instance, would a matter of that kind be taken up with, as to whether certain freight would be on hand to go out on a certain boat, with you or Mr. Simmons, or either of you?

A. With either one of us.

Q. You say it was not taken up with yourself. You don't know whether it was with Mr. Simmons, or not? A. No. I do not.

Redirect Examination.

Mr. GLENSOR.—Q. Mrs. Green, as to this letter, a carbon copy—

Mr. FORD.—We will stipulate that the copies

may be used instead of the originals. I have the originals, but it will take time to get them.

Mr. GLENSOR.—I will offer these letters in evidence. I will read them. This letter dated "San Francisco, California, December 27, 1917, Southern Pacific Co., San Francisco. Gentlemen"—

The COURT.—Is that all with the witness?

Mr. GLENSOR.—That is all. I may want to ask a question or two after I read these letters.

"Attention Mr. J. G. Stubbs, G. F. A. Your file No. 1–E, Contract #607.

"We beg to refer you to your letter of June 22nd, 1917, wherein you confirmed your earlier telephonic advice that you had booked for movement to Shanghai 750 tons of tinplate per [76] month for September, October, November and December. This booking was made by you to complete through shipments to be initiated by you on our account of tinplate from certain points of origin to Shanghai.

"Your files will disclose that numerous shipments originating at Eastern points have been undertaken by you and that we have from time to time advised you thereof. We have not yet been advised by you that any of this tinplate has been cleared from this coast and desire to have you hear us fully on the subject by return mail.

"We shall be very glad to do everything in our power to aid you in moving this freight. Please give the matter your immediate attention and let

us have your acknowledgment of the receipt of this communication.

"Yours very truly,
"BALDWIN SHIPPING COMPANY,
"By J. H. SIMMONS,
"Vice-President."

A letter on the letter-head of the Southern Pacific Company addressed to C. R. Haley & Company, 149 California Street, San Francisco, Calif., carbon copy to Baldwin Shipping Co., referring to a letter of the Baldwin Shipping Company dated October 12, S. F. tinplate.

"Gentlemen: Under above mentioned contract you booked 760 tons of tinplate per month, September, October, November and December clearance to Shanghai at ocean rate of $16.00 per 2,000 lbs.

"Wish to advise Union Pacific Export bill of lading 2034 covering approximately 350 tons to apply on this booking, and the Baldwin Shipping Company are holding export license which expires Nov. 22nd. Will you kindly look into this immediat*ley*, advising [77] me by return mail on what steamer this tinplate will clear in order that I may arrange to secure the necessary papers for clearance.

"Yours truly,
"(Sgd.) J. G. STUBBS.

"RWD."

A letter to J. G. Stubbs, Agent, Southern Pacific

Company, San Francisco, Calif., dated San Francisco, November 2, 1917:

"I respectfully refer you to your letter of June 22, your File 1–E, contract 608, in which you state you have booked firm for the account of the Baldwin Shipping Co. 2,000 tons pig iron and steel articles, inexcessive sizes, Japan, late July, August, and September clearance at an ocean rate of $15.00 per ton, weight or measurement, ship's option.

"I beg to call your attention to the fact that most of this tonnage is on hand San Francisco, in fact has been here for two or three months, and notwithstanding our repeated request on your office, and also Mr. Hardy's office as to prospective clearances, we have received absolutely no information whatever.

"Our clients have been pressing us on this business and they inform us that we must give them some definite satisfaction immediately, as they are tired of our repeated promises,—and, at the present time we must insist on the clearance of this business without delay.

"Kindly investigate this matter, and advise what reply we shall make to the shippers. In further connection with this booking beg to advise that the balance of the freight covered by this contract is now en route, and shippers are calling on our New York office for export bills lading, and will thank you to see that the necessary authority is trans-

mitted to your New Yo*ur* office for issuance of these documents.

"Yours truly,

"(Sgd.) BALDWIN SHIPPING CO.

"J. H. S." [78]

Q. That was J. H. Simmons, manager of the Baldwin Shipping Company, was it not, "J. H. S."? A. Yes.

Mr. GLENSOR.—I assume it will be admitted that Mr. Hardie was the local agent for the Southern Pacific in San Francisco?

Mr. FORD.—Yes.

Mr. GLENSOR.—A letter from the Baldwin Shipping Company to Mr. J. G. Stubbs, G. F. A., Southern Pacific Company, San Francisco, Calif., dated San Francisco, July 19, 1917:

"Dear Sir: Referring to your letter of June 28th, your file 1–3–Contract 613, covering approximately 2500 tons of pig iron and steel articles which you have booked for August to December clearance, Kobe-Yokohama, at ocean rate of $15.00.

"Kindly let us have the name of the steamship line via which these shipments are booked, so that we can advise the shippers.

"Yours truly,

"BALDWIN SHIPPING CO.,

"Vice-Pres."

I offer these communications in evidence and ask that they be marked "Libelant's Exhibit 1."

(The letters are marked "Libelant's Exhibit 1.")

Of course, we make no pretense that we are here

(Testimony of Glenna De Witt Green.)

this morning prepared to show how much arrived and did not clear; we are here this morning on the question of liability.

The COURT.—I understand.

Mr. GLENSOR.—That would be quite a burdensome proceeding, it would require a lot of records. That is all for the present, Miss Green.

Recross-examination.

Mr. FORD.—Q. You say Mr. J. H. Simmons was your vice-president and general manager during that period. A. He was. [79]

Q. Mrs. Green, is it not a fact that you, yourself, know of your own knowledge that during these early shipments, the ones that would go out on the first boats, that Mr. Simmons got a lower rate elsewhere, say, for instance, he was to ship at $16, he got a rate for $12, and shipped other goods on other boats, and he got into trouble with your company by reason of appropriating money to his own use?

A. Not at this time. I don't know of anything like that at that time.

Q. Is it not a fact that Mr. Simmons, by reason of appropriating moneys from your company, is now a fugitive from justice?

A. Well, I don't know of anything he did.

Q. Is it not a fact, with reference to some of these very shipments that Mr. Simmons made these contracts, or had these contracts made where he could get a rate to China or Japan, and he would take the same freight, when it arrived here, and

(Testimony of Glenna De Witt Green.)

farm it out to some other boats, from which he could get a lower rate for the time being, and failed to fulfill these contracts? A. No.

Q. Didn't you know of your own knowledge that as to the first part of these shipments by C. R. Haley & Co. that Mr. Simmons failed to fill, and that Mr. Haley lost his contract with the "Zealandia"?

A. I don't know anything about the steamer "Zealandia"; I never knew it.

A. Maybe you did not know. Didn't you know, though, that Mr. Simmons was doing that very thing, and that is the thing that got him in trouble?

A. No, not at this time.

Q. When was he doing it? A. Later, in 1918.

Q. You did not learn anything of this kind back in 1917? A. No.

Q. Did you learn in 1918 he was doing what I have related?

A. I have learned that he did irregular things regarding the [80] business of the Baldwin Shipping Company.

Mr. GLENSOR.—He is not a fugitive from justice.

Mr. FORD.—I had the information first from you people that he embezzled a lot of money from you people.

Mr. GLENSOR.—But he is not a fugitive from justice.

Mr. FORD.—I simply wanted to show what the fact was. That is all.

(Testimony of Glenna De Witt Green.)

Mr. GLENSOR.—Libelant rests. We offer, of course, in evidence these depositions.

Mr. FORD.—As I understand it, Mr. Glensor, you stipulate that the Southern Pacific Company did not have on file with the Interstate Commerce Commission any schedule of rates between the points indicated?

Mr. GLENSOR.—I will stipulate to that.

Mr. FORD.—Do you want me to prove that the company did not own or operate any boats between those points?

Mr. GLENSOR.—You can try to prove it. I am going to object to it.

Mr. FORD.—I do not think it is material, myself.

The COURT.—You will have to determine that for yourself.

Testimony of Percy P. Dougherty, for Defendant.

PERCY P. DOUGHERTY, called for the defendant, sworn.

Mr. FORD.—Q. You are, and have been for some time past, an employee of the Southern Pacific Company? A. Yes.

Q. And of the United States Railroad Administration during the time it was in charge?

A. Yes.

Q. Were you in the employ of the Southern Pacific Company during the year 1917?

A. I entered the service of the Southern Pacific Company December 11, 1916. [81]

Q. Now, during the period in question, have you

(Testimony of Percy P. Dougherty.)

been acquainted with the schedule or the tariffs on file with the Interstate Commerce Commission?

A. I was quoting freight rates for two years.

Q. Then you were, during all that time, acquainted with them, were you?

A. I am and were.

Q. Will you state to the Court whether or not during any of those times the Southern Pacific Company had on file with the Interstate Commerce Commission any schedule or tariff of rates between San Francisco or any Pacific Coast Port and China or Japan?

Mr. GLENSOR.—To which we reserve an objection that it is immaterial.

The COURT.—I will reserve my ruling on it. I think it is immaterial, myself, but you may proceed.

A. They did not.

Mr. FORD.—Q. Will you state to the Court whether or not during that period the Southern Pacific was operating any boats between the points in question.

Mr. GLENSOR.—The same objection.

The COURT.—I will reserve my ruling; you may answer.

Q. They were not, to my knowledge.

Mr. FORD.—Q. Did they own any boats that they were operating between those points?

A. No, not to my knowledge.

Q. During any of the time since you have been with them from 1916 up to the present, did they

(Testimony of Percy P. Dougherty.)

have any schedule of rates between those points?

A. No, never.

Cross-examination.

Mr. GLENSOR.—Q. Don't you know as a fact that some of the other carriers actually chartered steamers? A. I do not; no.

Q. You do not know? A. No. [82]

Q. For the purpose of protecting some of these bookings?

A. I could not say, for at that time I was not directly connected with the import and export work and it would not come to my knowledge.

Testimony of S. W. Brown, for Respondent.

S. W. BROWN, called for the respondent, sworn.

Mr. FORD.—Q. Mr. Brown, what is your business or occupation at the present time?

A. In the import and export business.

Q. With what concern?

A. Purchasing agent of the China, Japan & South America Trading Company.

Q. Formerly, were you in the employ of the Southern Pacific Company? A. I was.

Q. During what period, about?

A. From 1907 to sometime in 1917.

Q. You left the service of the company prior to the time the United States Railroad Administration took charge, then? A. I did.

Q. You were in the employ of the Southern Pacific Company during June, 1917? A. I was.

(Testimony of S. W. Brown.)

Q. And for a later period than that?

A. I was.

Q. Now, were you acquainted at the time in question, that is, around just prior to June and following June, 1917, with the conditions surrounding the securing of space for exporting goods from San Francisco to China and Japan? A. I was.

Q. Briefly, what was the situation?

A. Space was very hard to secure, not only by shippers, themselves, but by the railroads. The shippers, in a great many cases, would go to the railroads and ask them to secure space, when they, themselves, were unable to do so. It was, of course, the policy of the Southern Pacific to book such space direct with the steamers, if possible, but conditions at that time were such that it was impossible to [83] secure space, particularly for large tonnage, and it would be necessary to book that space through brokers.

Q. How, if you know, was it that space could be had through brokers while not directly with the companies?

A. Well, I don't know positively; my understanding was that they had foreseen congestion and had booked up large amounts of tonnage.

Q. Did you know the firm of C. R. Haley & Company? A. I did.

Q. What business was it engaged in?

A. In the freight brokerage business.

Q. Was it or not at that time quoting rates for shipments from San Francisco to China and

(Testimony of S. W. Brown.)

Japan? A. They were booking space.

Q. Do you know these three contracts that are referred to here—we refer to them as File Contract No. 607, 608 and 613. A. Not personally; no.

Q. You were in the department, were you?

A. I would prefer not to answer that question, without looking up my records.

Q. These were not matters that you, yourself, directly had to do with? A. No.

Mr. FORD.—The letters are already in evidence where the company advised you that they had engaged space, that is, all three contracts?

Mr. GLENSOR.—Yes, book space.

Mr. FORD.—As to that contract and copy of letter written by the Southern Pacific to C. R. Haley, that is in evidence?

Mr. GLENSOR.—Yes.

Mr. FORD.—You won't question the genuineness of this?

Mr. GLENSOR.—Not at all.

Mr. FORD.—We offer in evidence, then, your Honor, and we will offer it with reference to 613, a copy of this letter—it is already in evidence—offered by the Baldwin Shipping [84] Company, having been sent by the Southern Pacific Company, addressed by the Southern Pacific Company to C. R. Haley & Co., booking 2,500 tons of pig iron and steel articles at $15 a ton, and underneath a letter, the part we want to appear in evidence particularly is the signature of C. R. Haley & Co., O.K.'-ing the booking as agreed upon.

(Testimony of S. W. Brown.)

Now, with reference to 607, the same procedure, exactly, the same form of letter is written by the Southern Pacific Company to C. R. Haley & Company, confirming telephone conversation, and then stating what the tonnage to be shipped was, the rate, and asking that the matter be confirmed, the same as in the other instance.

Mr. GLENSOR.—Contract 607, you are talking about?

Mr. FORD.—Yes, and we have the confirmation of that contract. Now, 608 is for 2,000 tons, and I do not seem to have that file with me, although I have correspondence which shows the same procedure.

Mr. GLENSOR.—I have no objection to admitting that the Southern Pacific Company actually booked this stuff with C. R. Haley, that is, they made a subcontract, made a contract on their own account with C. R. Haley.

Mr. FORD.—Q. Now, Mr. Brown, do you know whether or not, at the period in question, space for the tonnage indicated in June, 1917, could have been had at these rates elsewhere?

The COURT.—That would go to the amount of damages, would it not?

Mr. FORD.—What I was aiming to show was that these brokers had contracts for the space and that it could not be had except through them.

The COURT.—Would this witness know those facts?

Mr. FORD.—He was engaged in that business,

(Testimony of S. W. Brown.)

and soliciting freight space from others. [85]

A. Not in as large blocks as that required by the Baldwin Shipping Company.

Q. You don't know personally whether attempts were made to get space elsewhere in this particular instance? A. I could not say.

Cross-examination.

Mr. GLENSOR.—Q. The space situation in San Francisco was speculative—ocean space was, was it not? A. To a certain extent.

Q. The money which was being made and lost by the men on the street—I am speaking of the street in the shipping sense—was in ocean space, was it not?

A. I could not answer that from the Southern Pacific standpoint; they did not speculate.

Mr. FORD.—There was one matter I overlooked.

Q. What has been the practice prior to June, 1917, and following that time, so far as the Southern Pacific Company was concerned, with reference to engaging space for shippers?

Mr. GLENSOR.—That is objectionable.

The COURT.—I do not see the point of it if there is a written contract here. He may answer if he desires to put the evidence in the record.

A. The Southern Pacific would book space directly with the steamship company if possible, and if not they would help their clients by booking it with brokers, but it was generally understood that

(Testimony of S. W. Brown.)

space was to be secured through whatever source was possible.

Q. Was this a frequent occurrence, that you would engage the space or book the space for your clients? A. It was.

Mr. GLENSOR.—Q. The idea back of the booking of this space was to get this stuff to move over your railroad to San Francisco, was it not?

Q. Generally speaking, yes.

Q. And you delivered it right to the steamship under these bookings and put it aboard the steamer, that is, you delivered it to the [86] docks, didn't you?

A. That was handled by the local officers, with which I was not familiar.

Q. You know as a fact, don't you, without knowing the details of how it was done, that the Southern Pacific cleared this freight under these bookings to the steamer?

A. Unless the shipper took it out of the hands of the Southern Pacific by arbitrarily diverting it to other steamer lines.

Q. Unless he did that, the Southern Pacific cleared under the bookings under which it arrived here? A. Yes.

Mr. FORD.—I presume it will be stipulated that this freight was booked directly from the points of origin to Yokohama, or wherever it was sent?

Mr. GLENSOR.—I don't know that to be a fact.

Mr. FORD.—We have here numerous shipments

(Testimony of S. W. Brown.)

that were made and they show from Ohio to Kobe, right on the face of the bill of lading where the shipment was made to. I have hundreds of them in here the same way, and I find no exception to the bills of lading being for through shipment.

Mr. GLENSOR.—I will tell you why. It goes into a question both of law and fact. These bills of lading that you have here are known as through export bill of lading, but the shipments travel on what is known as an inward bill of lading from the point of origin to San Francisco, and then an ocean bill of lading is issued thereon and the shipments traveled on the steamer on the ocean bill of lading, but this export bill of lading accompanies it all the time. The issuance of that export bill of lading back in New York and Philadelphia does not mean that the carrier is undertaking to transport it clear through.

Mr. FORD.—It simply went to the question you asked Mr. Brown about their delivery; for instance, if there was nobody here at all [87] representing the Baldwin Shipping Company, and this was billed through to Yokohama, why, the Southern Pacific Company would deliver it to them directly.

Mr. GLENSOR.—The issuance of that bill of lading does not bind us.

Mr. FORD.—All right.

Testimony of L. F. Boyson, for Respondent.

L. F. BOYSON, called for the respondent, sworn.

Mr. FORD.—Q. Mr. Boyson, you were in 1917 employed by the Southern Pacific Company?

A. I was.

Q. Were you there at the time the United States Railroad Administration took charge, the latter part of 1917? A. No.

Q. You left the employment before that?

A. Yes. However, I was employed by the Southern Pacific Company from January 1, 1919, to the latter part of 1919.

Q. That is, you had come back in the employ during the United States Railroad Administration? A. Yes.

Q. You were in its employ in June, 1917, and for a time thereafter, at the time of one of these transactions with the Baldwin Shipping Company?

A. I can't recall exactly the date I left, but I think I left there on June 1, or some time around there.

Q. Referring now to contract or file 613, wherein advice is given to the Baldwin Shipping Company that certain space has been engaged for June—

A. I was there I think until July 1st.

Q. You were there, then, in June, 1917?

A. Yes.

Q. You handled some of these transactions?

A. Yes.

Q. Did you come in contact with Mrs. Green?

(Testimony of L. F. Boyson.)

A. Not personally.

Q. Did you talk with her, if you know, about making these bookings?

A. I talked with the lady of the Baldwin Shipping Company's office. [88]

Q. You did not go to the office, though, to see her? A. No.

Q. Was it over the telephone?

A. Over the telephone.

Q. Then you followed up this conversation by engaging this space and writing that you had done so? A. Yes.

Q. At that time, was there any belief you could get space at the rates indicated other than through sources like C. R. Haley Co.?

A. No. At the time I was on this particular desk, it was the custom to call up all these steamship lines, and the particular reason this freight was booked through C. R. Haley was because it was the cheapest rate.

Q. Do you know how it was that these brokers, such as C. R. Haley and others in the business were able to quote a less rate than you could get?

A. I did not at that time.

Q. Did you know what steamers at the time in June, when you engaged this space, it was to be shipped on?

Mr. GLENSOR.—I object to that as immaterial.

A. I had no information on that point.

Mr. FORD.—Q. Was it possible for you to get the information?

(Testimony of L. F. Boyson.)

A. On repeated requests on Mr. Haley, he failed to give it to me.

Q. Did you then give the Baldwin Shipping Company all the information you had on the subject? A. I did.

Q. Were these transactions all handled in about the same way? A. About the same manner.

Q. As I understand you, you would call up the various steamship lines and get rates? A. Yes.

Q. And quote your clients the lowest rate?

A. Yes.

Q. Were you able to get any better rates than as indicated in this particular letter, I think it was $16 a ton? A. No.

Cross-examination.

Mr. GLENSOR.—Q. Mr. Boyson, have you an independent recollection [89] of these three contracts, 608, 6*L*7 and 613?

A. I happened to review the files a couple of years ago, and it is my recollection that I only booked one of these particular contracts.

Q. Which one of them?

A. I could not say, without referring to the files.

Mr. FORD.—Show him 613.

Mr. GLENSOR.—I think book 2; I am not sure. I will show you 607 and 608.

Q. Who was J. N. H.?

A. A party by the name of Mr. J. N. Harper.

Q. Are these two contracts booked by you?

A. Yes, that is my writing.

(Testimony of L. F. Boyson.)

Q. Now, I call your attention to the fact that the one here booked by J. N. Harper was booked in the form of a letter to C. R. Haley & Co., with a carbon copy to the Baldwin Shipping Co.?

A. Yes.

Q. While the two that were booked by you were booked by letter direct to the Baldwin Shipping Co.? A. Yes.

Q. You see that? A. Yes.

Q. Now, are you still willing and ready to swear that you notified the Baldwin Shipping Company that you booked these contracts with C. R. Haley & Co.?

A. According to these two contracts that I made there I did not notify them that I made the contracts with C. R. Haley.

Q. The third contract was actually made by Mr. Harper? A. Yes.

Redirect Examination.

Mr. FORD.—Q. Mr. Byson, what, if any, contract, agreement or understanding did you have with the Baldwin Shipping Company other than is contained in the letters in evidence here, where you say, "Referring to our former conversation, we have booked for your account 750 tons of tinplate a month for September, October, November and December to Shanghai at $16 per ton weight [90] or measurement, ship's option. This will be covered by Southern Pacific Contract 607. Kindly confirm in writing."

(Testimony of R. Roche.)

Mr. GLENSOR.—The question is objectionable. I do not see its purpose.

Mr. FORD.—Here is the reason. In reply to this letter, the Baldwin Shipping Company stated that the Southern Pacific Company had guaranteed this shipment. Now, you will notice there is quite an inconsistency between the letter which was written by Mr. L. F. Boyson, advising the Baldwin Shipping Company of what the Southern Pacific Company had done, and the Baldwin Shipping Company's reply.

The COURT.—That is merely their construction of it.

Mr. FORD.—That is all.

Testimony of R. Roche, for Defendant.

R. ROCHE, called for defendant, sworn.

Mr. FORD.—Q. Mr. Roche, you were, during the period we have been discussing here, in the employ of the Southern Pacific Company? A. I was.

Q. You were there at the time of Mr. Brown's employment? A. Yes.

Q. Did you have anything to do with booking any of this space for the Baldwin Shipping Company?

A. I made a firm booking with C. R. Haley & Co.

Q. On how many of these?

A. I think it was contract 613, to which it referred.

Q. It was one of these contracts that you did the booking on? A. Yes.

Q. Anyway, one of the bookings you made?

(Testimony of R. Roche.)

A. Yes.

Q. Did you go personally, or use the telephone?

A. No, I called up Mr. Haley on the telephone and asked him if he would book this [91] freight for me, and he called up later in the day and said he would take the freight at $15, and I told him it was O. K., we would take it, and I put an O. K. on the slip of paper and passed it to the head of the department, and I think it was confirmed to the Baldwin Shipping Company, and also confirmed to C. R. Haley & Co., and they acknowledged the booking.

Q. Was Mr. Boyson in the office also at the time you have been referring to?

A. I think he was there at that particular time.

Q. There were different ones of you who handled the matter?

A. Yes, there were several men on the import and export department.

Q. Who was your immediate superior?

A. Mr. Brown.

Q. This Mr. Brown who is here? A. Yes.

Q. But were these simple routine matters, that you would get the request and call up and get the rates? A. Yes.

Q. And advise the parties? A. Yes.

Q. How did it happen that this particular shipment you say you booked was booked with C. R. Haley & Co., rather than one of the steamship companies direct?

A. Well, we could not book with any steamship

(Testimony of R. Roche.)

company; the steamship companies were asking $20 a ton; we were trying to get the lowest rate possible for the clients, and the correspondence shows we went afterwards to the Robert Dollar Company and several other companies that wanted $20 a ton, and Haley finally agreed to accept it at $15 a ton and we naturally accepted it under the contract.

Q. Did you know Mr. Simmons, the manager of the Baldwin Shipping Company?

A. No, I was not acquainted with Mr. Simmons; I don't recall being acquainted with him, rather.

Q. You don't recall who it was that requested you to make this booking of the Baldwin Shipping Company? A. No. [92]

Cross-examination.

Mr. GLENSOR.—Q. You say you made this booking with C. R. Haley, one of them?

A. Yes, I made the booking.

Q. What is that contract, 613?

A. I think that is the contract.

Q. What did you know about Haley at that time? Did you know whether he had any steamers, or had any space?

A. We had had previous dealings with Mr. Haley, and we were able to book shipments with him.

Q. Did you clear any one of the bookings that you had made with him?

A. Yes, we made several.

Mr. FORD.—That is our case.

(Testimony of F. E. Ragland.)

Mr. GLENSOR.—I have three letters I wish to put in evidence.

Mr. FORD.—No doubt, I have the originals, so I won't object to them.

Mr. GLENSOR.—I will offer these letters in evidence; they were written in December, two of them undated, and one dated December 27, 1917, and they are demands for performance, clearance, and they request a reply, and no reply has ever been received, and I presume you want me to prove that fact.

The COURT.—They were written to the Southern Pacific Company?

Mr. GLENSOR.—Yes.

Mr. FORD.—You need not prove it at the present time; I would not question it now. If it comes to a question of damages, all the questions of whether the freight was presented for shipment, and why it was not presented, would be brought in.

Mr. GLENSOR.—Yes, I concede that, but if the Court holds the Southern Pacific Company liable, it is going to be quite a burden to get the records of all these cars, and clearances, and so on. The letters are marked "Libelant's Exhibit 2." [93]

Testimony of F. E. Ragland, for Libelant. (In Rebuttal).

F. E. RAGLAND, called for the libelant in rebuttal.

Mr. GLENSOR.—Q. What is your business, Mr. Ragland?

(Testimony of F. E. Ragland.)

A. Pacific Coast Manager for the Baldwin Shipping Company.

Q. How long have you been employed by the Baldwin Shipping Company?

A. Something over three years.

Q. What was your business before that?

A. I was working for the Western Pacific Railroad Company.

Q. About how long? A. Three or four years.

Q. In other words, you have been in the transportation business for the last seven or eight years; is that correct? A. Yes.

Q. You have been in it continuously during that time? A. Yes.

Q. You know the customs which appertain?

A. Yes.

Q. Will you state in general the manner in which bookings such as these here in question are made; that is to say, in what manner is a booking of this nature brought about? The railroads were soliciting freight, were they not, from the Baldwin Shipping Company, and from other forwarders about that time, were they not? A. Yes.

Q. What was the relation of the soliciting and the making of these bookings?

A. We would get an inquiry, of course, from our New York office, asking us to book certain freight, and as has already been stated, the space situation was very tight at that time, so we would go to all the steamship lines and railroads,—it was customary for the railroads to book space for every

(Testimony of F. E. Ragland.)

one or anyone for the privilege of hauling the freight, getting what they called line haul.

Q. That is to say, the railroads would come to you and solicit freight and as a part of the inducement for shipping over their line would tell you that they would get you ocean space and transportation; is that correct? A. Yes. [94]

Q. That was the universal custom?

A. That was the universal custom.

Q. Did you know at that time whether the railroads made any profit out of the ocean transportation of that freight? A. I did not.

Q. You did not know then? A. No.

Q. You don't know now? A. No.

Mr. FORD.—Mr. Glensor, if there is any contention that the Southern Pacific was making a profit, I would be glad to submit the whole file to you.

Mr. GLENSOR.—No, it is not. I wanted to prove this fact, that the Baldwin Shipping Company did not know anything about it one way or the other. That is not the point of my inquiry.

Mr. FORD.—If it comes to that, we will show without any question that Mr. Simmons could not get the space, and for that reason he was requesting the railroad to get it for him. Miss Green's deposition shows that.

Mr. GLENSOR.—It is a question of the construction of the contract.

The COURT.—Proceed with the examination of the witness.

Mr. GLENSOR.—Q. Mr. Ragland, is it not a fact that some of the other railroad carriers chartered ships to clear commodities that were brought in here by rail?

Mr. FORD.—That is objected to as immaterial, irrelevant and incompetent.

The COURT.—I do not see how it becomes material, but he may answer.

A. Yes, it is a fact that the Western Pacific Company chartered a steamer to protect their contracts.

Mr. GLENSOR.—That is all.

Mr. FORD.—That is all. [95]

[Endorsed]: Filed Feb. 23, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [96]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Monday, the eighth day of November, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,755.

BALDWIN SHIPPING COMPANY, etc.,

vs.

SOUTHERN PACIFIC COMPANY, etc.

Minutes of Court—November 8, 1920—Order Dismissing Libel.

Pursuant to opinion this day received from the Honorable Frank H. Rudkin, Judge, before whom this matter was submitted, the Court ordered that said opinion be filed and made a record herein and pursuant thereto, that the libel filed herein be and the same is hereby dismissed. [97]

In the District Court of the United States for the Northern District of California, Southern Division, First Division.

IN ADMIRALTY—No. 16,755.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Memorandum and Order Dismissing Libel.

AITKEN, GLENSOR, CLEWE & VAN DINE, Proctors for Libelant.

FORD & JOHNSON, Proctors for Libelee.

RUDKIN, District Judge.—There is little controversy over the facts in this case. The libelant is a corporation organized and existing under the laws of the State of Illinois, and is engaged in the

business of freight forwarding agent, with an agency at San Francisco, California. The libelee is a railway corporation organized and existing under the laws of the State of Kentucky, and as such is a common carrier engaged in interstate commerce between the States. The railway corporation does not own, control, or operate any steamship or steamship lines between Pacific Coast ports of China or Japan, and has never published or filed with the Interstate Commerce Commission any through or other rates from the port of San Francisco to any port or ports in China or Japan, but in the course of its business, as a matter of accommodation, and to induce shippers to transport their freight and merchandise over the Southern Pacific lines, the company has reserved space on steamers destined for foreign ports for freight and merchandise carried over its lines to San Francisco for foreign shipment. [98]

The libel contains three causes of action. The first charges, in substance, that on the 22d day of June, 1919, the libelee agreed with the libelant to reserve steamer space for the transportation, and to transport or cause to be transported, from San Francisco, California, to Japan, 2,000 tons of pig iron and steel products for late July, August and September clearance, at the rate of $15.00 per ton; that the libelee did not reserve steamer space for such shipment or any part thereof; that the libelant tendered the freight and demanded steamer space for its transportation from the port of San Francisco to Japan; that the libelee failed, neglected and

refused to accept the freight for transportation, or to transport the same, and that by reason thereof the libelant was compelled to procure other space and transport the freight at a cost of $10,000.00 in excess of the $15.00 per ton agreed upon. The remaining two causes of action are the same, but relate to different freight and different shipments.

Under the facts as disclosed by the testimony the libelant contends that the obligation on the part of the libelee to reserve and secure space and transport the freight to the designated port of China or Japan was absolute and unconditional. The libelee, on the other hand, contends that it was a mere agent at best, and having discharged its full duty in that regard, no liability rests upon it; and further, that if its undertaking or agreement be so construed as to impose a further or greater liability, the contract is repugnant to the laws of the United States, against public policy, and void.

In my opinion there can be no recovery in any aspect of the case. If the libelee was a mere agent to reserve steamer space, there is no claim of a failure or breach of duty in that regard, and if the undertaking was an absolute and unconditional one the contract was manifestly against public policy, and void. For example, [99] $10,000.00 damages is claimed for failure to reserve the space or transport the freight described in the first cause of action, and if this liability is enforced, the obvious result will be that the libelee has transported freight over its own lines in the United States for $10,000.00 less than the lawful rate from which it may not de-

part. The same is equally true of the other shipments. As said by the Court in J. H. Hamlen & Sons Co. v. Illinois Cent. R. Co., 212 Fed. 324:

> "If such contracts were permitted, their effect would be to nullify the provisions of the Interstate Commerce Act prohibiting discrimination, for by guaranteeing a lower rate on the foreign line, the difference, if any, would have to be paid out of the earnings of its own line, resulting in a lower rate than that published and charged to other shippers for the carriage of freight over the lines of the railroads, and a lower rate than that specified in its schedules filed with the commission."

The contention that a court of admiralty will and must enforce a contract prohibited by plain provisions of an Act of Congress calls for no comment.

The libel must be dismissed, and it is so ordered.

[Endorsed]: Filed Nov. 8, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [100]

In the District Court of the United States for the Northern District of California, Southern Division, First Division.

IN ADMIRALTY—No. 16,755.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Final Decree.

This cause came on regularly to be heard on the 19th day of August, 1920, Messrs. Aitken, Glensor, Clewe & Van Dine, appeared for libelant, and Messrs. Ford and Johnson, appeared for libelee. And evidence having been adduced by the respective parties and the matter having been argued and submitted to the Court for decision, and the Court having fully considered the matter, and having filed its opinion in writing herein, and the Court having ordered that said libel be dismissed,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the amended libel herein be and the same is hereby dismissed and that libelee recover its costs of suit taxed at the sum of $——.

Dated: November 30, 1920.

FRANK H. RUDKIN,

Judge of the United States District Court.

Foregoing decree approved in form. Lodgment waived.

AITKEN, GLENSOR, CLEWE & VAN DINE,

Proctors for Libelant. [101]

[Endorsed]: Filed Dec. 8, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 10, Judg. and Decrees, at page 217. [102]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Notice of Appeal.

To Libelee Above Named and to Messrs. Ford and Johnson, Its Proctors:

You will please take notice that Baldwin Shipping Company, Inc., a corporation, libelant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Decree in the above-entitled suit entered therein on the 30th day of November, 1920, wherein and whereby it is

ORDERED, ADJUDGED AND DECREED that the amended libel herein be dismissed and that libelee recover its costs of suit.

Dated, Feb. 21, 1921.

GLENSOR, CLEWE & VAN DINE,
Proctors for Libelant.

Due service and receipt of a copy of the within

notice of appeal is hereby admitted this —— day of February, 1921.

FORD & JOHNSON,
Attorney for Libelee.

[Endorsed]: Filed Feb. 23, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [103]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

IN PERSONAM.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Assignment of Errors.

I.

That the Court erred in holding and deciding that the contracts made between libelant and libelee by which libelee was to reserve space for libelant's freight on steamers sailing from San Francisco were against public policy and void and in not holding that said contracts were valid and enforceable.

II.

That the Court erred in holding and deciding, in effect, that said contracts were in violation of the Act of Congress known as the Hepburn Act (Act of June 29, 1906), and in not holding that said contracts (being separate and distinct for ocean carriage to foreign countries) were wholly outside said Hepburn Act.

III.

That the Court erred in sustaining the defense set up in libelee's amendment to its answer to libelant's amended libel and in not holding that said defense was no defense to said amended libel either in law or in fact. [104]

IV.

That the Court erred in not holding and deciding that libelee was estopped to either allege or prove the matters set up in said amendment to its answer, or to claim that the contracts sued on were either against public policy or void.

V.

That the Court, in the exercise of its admiralty jurisdiction, erred in holding and deciding, under all the facts in the case, that libelee was not bound by its contracts as set forth in the amended libel and proved at the trial, and in not holding and deciding that libelee was legally bound by its said contracts.

VI.

That the Court erred in holding and deciding that if the libelee were a mere agent to reserve steamer space, there was no claim of a failure or

breach of duty in that regard, and in not holding that there was a claim of such failure and breach of duty and that such failure and breach of duty was fully proved at the trial.

VII.

That the Court erred in not expressly holding that libelee's undertakings to reserve space for libelant were absolute and unconditional and that it was in no sense a mere agent to reserve such space.

VIII.

That the Court erred in holding and deciding, in effect, that the Hepburn Act above mentioned was applicable in admiralty cases or in admiralty courts in cases involving shipments by water to foreign countries in which no unjust discrimination has been proved.

IX.

That the Court erred in making and entering its final decree [105] dismissing the amended libel with costs and in not making and entering an interlocutory decree in favor of libelant, with interest and costs and referring the case to a Commissioner to ascertain the damages.

Dated, February 21, 1921.

GLENSOR, CLEWE & VAN DINE,
Proctors for Libelant.

Due service and receipt of a copy of the within assignment of error is hereby admitted this 21st day of February, 1921.

FORD & JOHNSON,
Attorneys for Libelee.

[Endorsed]: Filed Feb. 23, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [106]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That Globe Indemnity Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of New York and having an office and agent of record in the State of California, and being duly qualified under the laws of the said State of California, to do business therein, is held and firmly bound unto Southern Pacific Company, a corporation, in the sum of two hundred and fifty dollars ($250.00), to be paid to the said Southern Pacific Company, a corporation, its successors and assigns, for the payment of which well and truly to be made Globe Indemnity Company binds itself firmly by these presents.

The condition of this obligation is such, that whereas Baldwin Shipping Company, Inc., a corporation, Appellant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a decree of the District Court of the United States for the Southern Division of the Northern District of California, bearing date the 30th day of November, 1920, in a [107] suit wherein Baldwin Shipping Company, Inc., a corporation, is libelant, and Southern Pacific Company, a corporation, is libelee.

NOW, THEREFORE, if the above-named appellant, Baldwin Shipping Company, Inc., shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Dated, Feb. 21st, 1921.

GLOBE INDEMNITY COMPANY.

[Seal] By JOHN H. ROBERTSON,

Its Attorney in Fact.

Approved as to form and sufficiency.

FORD & JOHNSON.

Feb. 21st, 1921.

[Endorsed]: Filed Feb. 23, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [108]

In the Southern Division of the United States District Court of the Northern District of California, First Division.

IN ADMIRALTY—No. 16,755.

IN PERSONAM.

BALDWIN SHIPPING COMPANY, INC., a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelee.

Stipulation and Order for Sending up Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED that all of the original exhibits introduced in evidence in the above cause may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal herein as original exhibits and need not be copied.

Dated: Feb. 21, 1921.

GLENSOR, CLEWE & V. D.,
Proctors for Libelant.

FORD & JOHNSON,
Proctors for Libelee.

ORDER.

Pursuant to the foregoing stipulation it is hereby ordered that the original exhibits introduced in evi-

dence in the above cause may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal herein as original exhibits and need not be copied.

Dated: Feb. 23, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 23, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [109]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 109 pages, numbered from 1 to 109, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the cause entitled, Baldwin Shipping Company, Inc., a Corp., Libelant, vs. Southern Pacific Company, a Corporation, Respondent, No. 16,755, as the same now remain on file and of record in this office; said transcript having been prepared in accordance with and pursuant to the praecipe for apostles on appeal (copy of which is embodied in said transcript), and the instructions of the proctors for libelant and appellant herein.

I further certify that the cost of preparing and certifying the foregoing apostles on appeal is the sum of thirty-nine dollars and fifty-five cents ($39.55), and that the same has been paid to me by the proctors for appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of March, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [110]

[Endorsed]: No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Baldwin Shipping Company, Inc., a Corporation, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed March 4, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

Libelant's Exhibit No. 1.

[Letter-head of Southern Pacific Company.]

In reply please refer to
No. 1–E–Contract #607.

San Francisco, Cal., June 22, 1917.

Baldwin Shipping Co.,
433 California St.,
San Francisco, Cal.

Gentlemen:

Referring to our phone conversation we have booked for your account 750 tons of tin plate a month for September, October, November and December to Shanghai at $16.00 per ton, weight or measurement, ship's option.

This will be covered by Sou. Pac. Contract #607.

Kindly confirm in writing.

Yours truly,
(Sgd.) J. G. STUBBS,
L. & B.

Libelant's Ex. 1 for Identification.

Libelant's Ex. 1.

[Endorsed]: No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 2.

June 26th, 1917.
Tinplate.

SUBJECT—3,000 TONS TINPLATE—SHANGHAI. Sept. to Dec., 1917, Inc.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Co.,
San Francisco, Calif.

Dear Sir:

This will acknowledge receipt of your letter of June 22nd, File 1-E-Contract #607, booking for the account of the Baldwin Shipping Company 750 tons tinplate per month, September, October, November and December, 1917, at ocean rate of $16.00 per ton, weight or measurement, ship's option,—destined Shanghai and covered by your Contract No. 607.

You have advised us that at the present time you cannot inform us of the name of line with which you have booked this 3,000 tons of tinplate, but guarantee to clear on first-class steamers carrying lowest rate of insurance, and to protect the above rate,—this is agreeable to us, however, at the earliest possible date let us know with whom you have booked this business so that we can give instructions to our New York office, relative issuance of the bills of lading.

We will keep you advised of the forwarding of

this business from the mills and, if we can assist you in any way, do not fail to let us know.

Yours truly,
BALDWIN SHIPPING COMPANY,

_____,
Vice-Pres.

D
CC—NY
Chgo

In taking out ladings on this business see that So. Pac. is the Terminal delivery line.

Libelant's Ex. No. 4 for Identification.

Libelant's Ex. 2.

[Endorsed]: No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 3.

[Letter-head of Southern Pacific Company.]

In reply please refer to
No. 1–E–Contract #608.

San Francisco, Cal., June 22, 1917.

Baldwin Shipping Co.,
433 California St.,
San Francisco, Cal.

Gentlemen:

Confirming phone conversation:

We have booked for your account 2000 tons of pig iron and steel articles, inexcessive sizes, Japan, late July, August and September, at $15.00 per ton, weight or measurement, ship's option.

This will be covered by Southern Pacific Contract #608.

Kindly confirm in writing.

Yours truly,

J. G. STUBBS,
L. & B.

Libelant's Ex. 2 for Identification.
Libelant's Ex. 3.

[Endorsed]: No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 4.

June 26th–1917.
S. F. 1112.

SUBJECT—2,000 TONS STEEL ARTICLES—JAPAN.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Co.,
San Francisco, Calif.

Dear Sir:

This will acknowledge receipt of your letter of June 22nd, File 1—E, Contract #608, booking for the account of the Baldwin Shipping Company 2000 tons pig iron and steel articles, inexcessive sizes, Japan, late July, August and September clearance at ocean rate of $15.00 per ton, weight or measurement, ship's option,—covered by your Contract No. 608.

You have advised us that just at the present time you cannot divulge to us name of steamer line with whom you have booked these 2,000 tons steel arti-

cles, but that you guarantee to protect $15.00 rate, and clear on first-class steamers carrying lowest rate of insurance, however, as soon you are able to advise us with whom you have booked this freight, please to do so in order that we may give instructions to our New York office, relative to the issuance of the bills of lading.

We will keep you advised of the forwarding of this business from the mills, and, if we can be of any further assistance to you, do not fail to let us know.

Yours truly,
BALDWIN SHIPPING COMPANY,

_____,
Vice-pres.

D.
CC—NY. Chgo.

In routing this business do not fail to see that the So. Pac. is the terminal delivery line.

Libelant's Ex. 4.

[Endorsed]: No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 5.

[Letter-head of Southern Pacific Company.]

In reply please refer to
No. 1-E—Iron & Steel Contract 613.

June 28, 1917.

Messrs. C. R. Haley & Company,
149 California Street,
San Francisco, Calif.

Gentlemen:—

Confirming phone conversation date:

Please book for the Southern Pacific 2500 tons Pig Iron and Steel articles for August and December clearance to Kobe and Yokohama at $15.00 weight or measurement, ship's option.

This will be covered by Southern Pacific Contract 613.

I am attaching hereto an extra copy of this letter and would thank you to place acknowledgment thereon and return.

Yours truly,
J. G. STUBBS.
JMH.

Enclosures.
CC—Baldwin Shipping Co.,
433 California St., City.
Libelant's Ex. 3 (Identification).
Libelant's Ex. 5.
[In pencil:] Rite N. Y.

[Endorsed]: No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 6.

June 28th–1917.
S. F. 1113.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Co.,
San Francisco, Calif.

Dear Sir:

This will confirm telephone conversation with your Mr. Brown, booking firm for the account of the Baldwin Shipping Company, 2500 tons steel articles, inexcessive sizes, destined Kobe-Yokohama, for clearance from San Francisco, August to December, inclusive, 1917, at ocean rate of $15.00, weight or measurement, ship's option,—covered by your Contract No. 613.

You advise that you guarantee to protect ocean rate of $15.00 per ton, and to clear on first-class steamers carrying lowest rate of insurance, however, at the earliest possible date would thank you to advise steamer line with which you booked these 2500 tons, so that we can instruct our New York office relative to issuance of bills of lading.

Please acknowledge.

Yours truly,
BALDWIN SHIPPING COMPANY,

_____,
D. Vice-pres.

Rite N. Y.

Libelant's Ex. 6.

[Endorsed]: No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 1.

COPY.

July 19th–1917.
SF. 1113.

Subject: "2500 Tons Steel Articles—Japan.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Company,
San Francisco, Cal.

Dear Sir:

Referring to your letter of June 28th, your file 1-3–Contract 613, covering approximately 2500 tons of pig iron and steel articles which you have booked for August to December clearance, Kobe-Yokohama, at ocean rate of $15.00.

Kindly let us have the name of the steamship line via which these shipments are booked, so that we can advise the shippers.

Yours truly,
BALDWIN SHIPPING CO.,
_____,
Vice-Pres.

S. D.

BALDWIN SHIPPING COMPANY.

COPY.

San Francisco, Sept. 12th–1917.
Tinplate.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Company,
San Francisco, Cal.

Dear Sir:

Please note that it will be necessary for you to

have Export Licenses on all Shanghai, Java and Japan tinplate before shipments can be cleared.

Kindly refer to your Contract No. 607 booking of tinplate destined Shanghai, China, for the account of the Baldwin Shipping Co.

For your information beg to state that we have just received the following bills of lading to apply on this booking:

SB B/L 1704—Car Pa 56788
" " 1705— " NYP 1912
" " 1702— " " "
" " 1703— " " " , Pa 56788, Pa 22887, WM 25832

Yours truly,
(Sgd.) BALDWIN SHIPPING CO.,
J. H. SIMMONS, V.-P.

JSW–W.
CC–NY–N. Y. 10173.

BALDWIN SHIPPING COMPANY.
San Francisco, Nov. 2nd–1917.
S. F. 1112.

Mr. J. G. Stubbs, Agent,
Southern Pacific Co.,
San Francisco, Calif.

Dear Sir:

I respectfully refer you to your letter of June 22, your File 1–E, contract 608, in which you state you have booked firm for the account of the Baldwin Shipping Co., 2,000 tons pig iron and steel articles, inexcessive sizes, Japan, late July, August and September clearance at an ocean rate of $15.00 per ton, weight or measurement, ship's option.

I beg to call your attention to the fact that most of this tonnage is on hand San Francisco, in fact has been here for two or three months, and notwithstanding our repeated request on your office, and also Mr. Hardy's office as to prospective clearances, we have received absolutely no information whatever.

Our clients have been pressing us on this business and they inform us that we must give them some definite satisfaction immediately, as they are tired of our repeated promises,—and, at the present time we must insist on the clearance of this business without delay.

Kindly investigate this matter, and advise what reply we shall make to the shippers. In further connection with this booking beg to advise that the balance of the freight covered by this contract is now enroute, and shippers are calling on our New York office for ecport bills lading, and will thank you to see that the necessary authority is transmitted to your New York office for issuance of these documents.

Yours truly,

(Sgd.) BALDWIN SHIPPING CO.,

J. H. S.

CC–NY.

COPY.

SOUTHERN PACIFIC COMPANY.

I. E. C. R. Haley Cont. 607.

San Francisco, Oct. 23–1917.

Messrs. C. R. Haley & Co.,
149 California, St.,
San Francisco, Calif.

Gentlemen:

Under above mentioned contract you booked 760 tons of tinplate per month, September, October, November, and December clearance to Shanghai at ocean rate of $16.00 per 2,000 lbs.

Wish to advise Union Pacific Export bill of lading 2034 covering approximately 350 tons to apply on this booking, and the Baldwin Shipping Company are holding export license which expires Nov. 22nd. Will you kindly look into this immediately, advising me by return mail on what steamer this tinplate will clear in order that I may arrange to secure the necessary papers for clearance.

Yours truly,
(Sgd.) J. G. STUBBS,
RWD.

CC–Baldwin Shipping Co.

Your letter Oct. 12th, S. F. tinplate.

San Francisco, California, December 27th, 1917.

N. Y. File 9956.

Southern Pacific Co.,
San Francisco,
California.

Gentlemen:

Attention—Mr. J. G. Stubbs, G. F. A.

Your file No. 1—E, Contract #607.

We beg to refer you to your letter of June 22nd,

1917, wherein you confirmed your earlier telephonic advice that you had booked for movement to Shanghai 750 tons of tinplate per month for September, October, November and December. This booking was made by you to complete through shipments to be initiated by you on our account of tin plate from eastern points of origin to Shanghai.

Your files will disclose that numerous shipments originating at eastern points have been undertaken by you and that we have from time to time advised you thereof. We have not yet been advised by you that any of this tin plate has been cleared from this coast and desire to have you hear us fully on the subject by return mail.

We shall be very glad to do everything in our power to aid you in moving this freight. Please give the matter your immediate attention and let us have your acknowledgment of the receipt of this communication.

Yours very truly,
BALDWIN SHIPPING COMPANY,
By J. H. SIMMONS,
Vice-President.

San Francisco, Calif., December, 1917.
S. F. 1113.

Southern Pacific Company,
San Francisco,
California.

Gentlemen:

Attention—Mr. J. G. Stubbs, G. F. A.

Your file No. 1—E, Iron and Steel Contract, #613.

We beg to refer you to your letter of June 28th,

1917, addressed to Messrs. G. R. Haley & Co., a copy of which you forwarded to us, wherein you confirmed your earlier telephonic advice to Haley & Co. that you had booked for movement to Kobe and Yokahama 2500 tons pig iron and steel articles for August and December clearance. This booking was made by you to complete through shipments to be initiated by you on our account of pig iron and steel articles from eastern points of origin to Kobe and Yokahama.

Your files will disclose that numerous shipments originating at eastern points have been undertaken by you and that we have from time to time advised you thereof. We have not yet been advised by you that any of this pig iron and steel has been cleared from this coast, and desire to hear from you fully on the subject by return mail.

We shall be very glad to do everything in our power to aid you in moving this freight. Please give the matter your immediate attention and let use have your acknowledgment of the receipt of this communication.

Yours very truly,
BALDWIN SHIPPING COMPANY.
By ————————,
Vice-President.

[Endorsed]: United States District Court. No. 16,799. Baldwin S. Co. vs. S. P. Co. Lib. Exhibit No. 1. Filed Aug. 19, 1920. Walter B. Maling, Clerk. By Lyle P. Morris, Deputy Clerk.

No. 3656. United States Circuit Court of Ap-

peals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit No. 2.

[Letter-head of Baldwin Shipping Company.]

San Francisco, Cal., December 27—1917.

Please Refer to File NY file 9956.

Southern Pacific Co.,
San Francisco,
California.

Gentlemen:

Attention—Mr. J. G. Stubbs, G. F. A.
Your file No. 1—E, Contract #607.

We beg to refer you to your letter of June 22nd, 1917, wherein you confirmed your earlier telephonic advice that you had booked for movement to Shanghai 750 tons of tin plates per month for September, October, November and December. This booking was made by you to complete through shipments to be initiated by you on our account of tinplate from eastern points of origin to Shanghai.

Your files will disclose that numerous shipments originating at eastern points have been undertaken by you and that we have from time to time advised you thereof. We have not yet been advised by you that any of these tin plates have been cleared from this coast and we desire to hear from you fully on this subject by return mail.

We shall be very glad to do everything in our power to aid you in moving this freight. Please give this matter your immediate attention and let

us have your acknowledgment of the receipt of this communication.

Yours very truly,
BALDWIN SHIPPING COMPANY.
By J. H. SIMMONS,
Vice-Pres.

Received Dec. 28, 1917.

[Letter-head of Baldwin Shipping Company.]

San Francisco, Cal., December, 1917.
Please refer to file SF 1113.

Southern Pacific Company,
San Francisco, Cal.

Gentlemen:

Attention—Mr. J. G. Stubbs, G. F. A.

Your file No. 1—E, Iron and Steel Contract 613.

We beg to refer you to your letter of June 28th, 1917, addressed to Messrs. C. R. Haley & Co., a copy of which you forwarded to us, wherein you confirmed your earlier telephonic advices to Haley & Co., that you had booked for movement to Kobe and Yokohama 2500 tons pig iron and steel articles for August and December clearance. This booking was made by you to complete through shipments to be initiated by you on our account of pig iron and steel articles from eastern points of origin to Kobe and Yokohama.

Your files will disclose that numerous shipments originating at eastern points have been undertaken by you and that we have from time to time advised you thereof. We have not yet been advised by you that any of this pig iron and steel has been cleared

from this coast, and desire to hear from you fully on the subject by return mail.

We shall be very glad to do everything in our power to aid you in moving this freight. Please give the matter your immediate attention and let us have your acknowledgment of the receipt of this communication.

Yours very truly,
BALDWIN SHIPPING COMPANY.
By J. H. SIMMONS,
Vice-President.

Received Dec. 28, 1917.

[Letter-head of Baldwin Shipping Company.]

Received Dec. 28, 1917.

San Francisco, Cal., December, 1917.
Please refer to file SF 1112.

Southern Pacific Co.,
San Francisco, Cal.

Gentlemen:

Attention—Mr. J. G. Stubbs, G. F. A.
Your file No. 1—E, Contract 608.

We beg to refer you to your letter of June 22nd, 1917, in which you confirmed your earlier telephonic advice to the effect that you had booked for movement to Japan 2000 tons of pig iron and steel articles, inexcessive sizes during late July and the months of August and September of this year. This booking was made by you to complete through shipments of iron and steel which were initiated by you on our account from eastern points of origin to points of destination in Japan.

Your files will disclose the fact that such ship-

ments were undertaken by you at eastern points of origin and that we have frequently called upon you to complete the movement thereof to Japan. This you have failed to do and iron and steel which under your agreement with us should have been cleared from this coast on or prior to the end of September of this year, is still in this port.

Subsequently to the 30th day of September, 1917, we made further demand upon you for the completion of the shipments, but without avail.

We must and we do hold you responsible for and look to you for the completion of your contract. In view, however, of the previous course of events and the present situation, we find ourselves under the necessity of securing the movement of the tonnage to Japan the shipment of which you have undertaken, but which up to this time has proceeded no further than to this port, as best we may.

You are advised therefore that we shall endeavor to secure the necessary cargo space for this purpose in the open market upon the best terms available. We shall wish to minimize damages maybe and to that end will whenever we can conveniently do so, inform you of contemplated bookings so as to give you an opportunity to obtain better terms if you desire to do so.

You are further advised that we shall hold you responsible for damage which we have already suffered or which we may hereafter suffer by reason

of your nonperformance of your contract.

Yours very truly,
BALDWIN SHIPPING COMPANY.
By J. H. SIMMONS,
Vice-President.

[Endorsed]: United States District Court. No. 16,799. Baldwin S. Co. vs. S. P. Co. Lib. Exhibit No. 2. Filed Aug. 19, 1920. Walter B. Maling, Clerk. By Lyle P. Morris, Deputy Clerk.

No. 3656. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 4, 1921. F. D. Monckton, Clerk.

Certificate of Clerk U. S. District Court as to Original Exhibits.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the attached exhibits (eight in number), marked:

(EXHIBITS ATTACHED TO DEPOSITION OF GLENNA DE WITT GREEN):

Libelant's Exhibit 1 (letter).
Libelant's Exhibit 2 (letter).
Libelant's Exhibit 3 (letter).
Libelant's Exhibit 4 (letter).
Libelant's Exhibit 5 (letter).
Libelant's Exhibit 6 (letter).

(EXHIBITS FILED IN OPEN COURT):

Libelant's Exhibit 1 (letters—6).
Libelant's Exhibit 2 (letters—4).

are original exhibits introduced and filed in the cause entitled: Baldwin Shipping Company, Inc., a Corp., Libelant, vs. Southern Pacific Company, a Corp., Respondent, No. 16,755, and are transmitted herewith in their original form in accordance with an order of this Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of March, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

No. 3656

United States

Circuit Court of Appeals

For Ninth Circuit

BALDWIN SHIPPING COMPANY, INC., a corporation,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Brief for Appellant

Baldwin Shipping Company

E. B. McCLANAHAN,
S. HASKET DERBY,
H. W. GLENSOR,
ERNEST CLEWE,
CARROLL SINGLE,

Mills Building, San Francisco, Calif.,
Proctors for Appellant.

United States

Circuit Court of Appeals

For the Ninth Circuit

BALDWIN SHIPPING COMPANY, INC., a corporation, Appellant, vs. SOUTHERN PACIFIC COMPANY, a corporation, Appellee,	No. 3656

BRIEF FOR APPELLANT, BALDWIN SHIPPING COMPANY.

This is an appeal from a decree dismissing a libel in admiralty brought by appellant against the respondent and appellee, the Southern Pacific Company, for damages for breach of three contracts to reserve steamer space for certain pig iron, steel and tinplate for shipment from San Francisco to the Orient.

STATEMENT OF FACTS.

Appellant made three contracts with appellee in San Francisco in the summer of 1917, which, in so far as they are written, were introduced in evidence as Exhibits and are set forth on Pages 22 to 27 of

the record. The contracts related to 2000 tons of pig iron and steel, 2500 tons of pig iron and steel, and 3000 tons of tinplate respectively. The uncontradicted evidence shows that the bookings were arranged by telephone (Deposition of Mrs. Green, pp. 36-42) and were confirmed by letters from appellee. (Record Id.) The three agreements were admitted by the parties to be of similar character (Record p. 67) and for the purpose of determining liability, the first one was chosen by the court and the parties. The letters which passed on the subject of this contract were as follows:

"SOUTHERN PACIFIC COMPANY.

San Francisco, Cal., June 22nd, 1917.
No. 1.-E.—Contract 608.

Baldwin Shipping Company,
433 California Street
San Francisco, Cal.

Gentlemen:—

Confirming Phone Conversation.

We have booked for your account 2000 tons of pig iron and steel articles, inexcessive sizes, Japan late July August September, at $15.00 per ton, weight or measurement, ship's option.

This will be covered by Southern Pacific Contract 608.

Kindly confirm in writing,

Yours truly,
(Signed) J. G. STUBBS."

"BALDWIN SHIPPING COMPANY.

San Francisco, June 26th, 1917.
S. F. 1112.

Subject—2,000 tons steel articles—Japan.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Co.,
San Francisco, Calif.

Dear Sir:

This will acknowledge receipt of your letter of June 22nd, File 1 - E contract 608, booking for the account of the Baldwin Shipping Company, 2,000 tons pig iron and steel articles, inexcessive sizes, Japan late July, August and September clearance at ocean rate of $15.00 per ton, weight or measurement, ship's option—covered by your contract 608.

You have advised us that just at the present time you cannot divulge to us name of steamer line with whom you have booked these 2,000 tons steel articles, but that you guarantee to protect $15.00 rate, and clear on first-class steamers carrying lowest rate of insurance, however, as soon as you are able to advise us with whom you have booked this freight; please do so in order that we may give instructions to our New York office, relative to the issuance of the bills of lading.

We will keep you advised of the forwarding of this business from the mills, and, if we can be of any further assistance to you, do not fail to let us know.

Yours truly,
(Sgd) BALDWIN SHIPPING COMPANY
J. H. S.

CC-NY. In routing this business do not fail to see that the S. P. is the terminal delivery line."

After the making of these contracts, the appellant repeatedly applied to the appellee for information

as to the name of the steamer or steamer line by which the commodities were to be exported, but could secure no information on this subject (Record, pp. 74, 77, 128-138). As a matter of fact the appellee did not book the shipments either with any steamer or steamship line at all, but with C. R. Haley & Company, a brokerage firm (Record, pp. 91-92), of which appellant knew nothing (*Id.* p. 75). Haley & Company, in turn, appear to have repeatedly failed to furnish appellee with the names of the steamers or lines on which the goods were booked (*Id.* pp. 97-98) and, as a matter of fact, for reasons unexplained, they wholly failed to carry out these sub-contracts. The consequence was that, when the commodities arrived in San Francisco, freight rates to the Orient had risen and appellant was compelled to pay considerably more than the $15.00 per ton, for which appellee had agreed to book the goods. All questions as to the amount of the damages were reserved and the only question presented was one of liability.

Under these facts, appellee contended in the lower court that it was not liable upon two grounds: (1) that it was a mere agent to reserve steamer space for appellant and performed its duty in that regard and (2) that, if its undertaking was more than this, the contract was repugnant to the Hepburn Act, against public policy and void. It is but fair to say that the last defense was an afterthought interposed for the first time on the day of the trial and that, at that time, the court did not appear to take it seriously. (Record pp. 66, 88.)

THE LOWER COURT'S DECISION.

The learned judge of the District Court, in an opinion of admirable brevity and clearness, summed up the facts of the case which he considered pertinent to his decision, namely, that the appellee was a common carrier engaged in interstate commerce which did not operate any steamers between San Francisco and the Orient and had never published or filed any through or other rates for such shipments with the Interstate Commerce Commission, "but in the course of its business as a matter of accommodation and to induce shippers to transport their freight and merchandise over the Southern Pacific lines, the company has reserved space on steamers destined for foreign ports for freight and merchandise carried over its lines to San Francisco for foreign shipment." The court then stated the salient facts of this case and the appellee's two lines of defense and held that there could be no recovery on either aspect of the case.

The court states that, if appellee was a mere agent to reserve steamer space, "there is no claim of a failure or breach of duty in that regard," which statement we dispute *in toto,* as will later appear. The court then further held, and this was the real ground of the decision, that, if the undertaking was an absolute and unconditional one, it was manifestly against public policy and void.

CONTENTIONS OF APPELLANT.

It is unnecessary to set forth in full the assignment

of errors in this case, which fully covers the points involved. Under them we shall contend:

1. That it was claimed in the lower court and is still claimed that, if appellee was a mere agent, it absolutely violated the first duties of an agent and that it cannot defend this case on the ground that it was such an agent. We shall also contend, under this head, that it was not agent at all and that its agreement to reserve space was an absolute agreement as a principal.

2. That the agreement in question was in no sense against public policy or void, or, as contended by appellee and impliedly held by the court, in violation of the Hepburn Act, and that appellee is, under the facts of this case, estopped from making any such contention.

I.

THE QUESTION OF AGENCY

All of the contracts in this case were, as previously stated, initiated and arranged by telephone conversations. The first and third contracts were reduced to the form of letters, the letters passing in regard to the first contract having been already set out and those in regard to the third being similar (except that the subject matter was 3000 tons of tinplate and the shipment dates September to December instead of July to September.) The rate in each case was $15.00 per ton (except as to the tinplate which was $16.50). The second contract was verbal; but it appears that the appellee sent to appellant a copy of its letter to C. R. Haley & Co. purporting to book *"for the Southern Pacific"* 2500 tons of pig iron and steel

(Record, pp. 24, 99.) Appellee also apparently made similar arrangements with C. R. Haley & Co. as to the first and third contracts, but it never notified appellant as to these arrangements (*Id.* p. 99) and, as a matter of fact, appellant paid no attention to this letter except to file it away, claiming at all times (and rightly so claiming) that its arrangements were with the Southern Pacific Company alone (*Id.* pp. 74-77).

It will be noted that in the first contract (the others being similar) the appellee states, "confirming phone conversation" that "we have booked for your account" and further stated that "This will be covered by *Southern Pacific Contract* 608." (Record, p. 23). It will further be noted that in appellant's reply, it stated that:

> "You have advised us that just at the present time you can not divulge to us name of steamer line with whom you have booked these 2,000 tons steel articles, but that you *guarantee to protect $15.00 rate,* and *clear on first class steamers* carrying the lowest rate of insurance, however, as soon as you are able to advise us with whom you have booked this freight please do so in order that we may give instructions to our New York office, relative to the issuance of the bills of lading."*

This understanding was never dissented from by appellee and, moreover, is borne out by the telephone

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**Note.*—This reference to the bills of lading obviously refers to the bills to be issued by appellant as a forwarding agent and not to the bills to be issued by the carriers. This is noted for the court's information, though not a matter of much importance.

conversations (Record, p. 41). It further appears from the testimony that the appellee itself and not the appellant took upon itself the clearing of the freight to the steamers under the previous bookings (*Id.* p. 94), thus showing that the responsibility for shipping the goods was wholly that of the appellee.

It is contended by appellee and stated by the court that the bookings were made by appellee as an accomodation to appellant and in consideration of appellant's giving it (the appellee) the inland haul. This fact does not clearly (or even at all as to these particular transactions) appear from the testimony, but we believe that, in part at least, it is the truth and we shall not (unless forced by our opponents to do so) dispute on this appeal that the appellee agreed to book these goods because of its being made the *terminal* inland carrier. This is partly borne out by appellant's statement at the close of its letters to appellee reading:

> "CC-NY In routing this business do not fail to see that the S. P. is the terminal delivery line."

This obviously means that appellant was instructing its New York office to make the Southern Pacific the terminal carrier for the equally obvious purpose of enabling *appellee* to carry out its contract to ship the goods under the bookings it had arranged to the Orient. This *only* meant, however, that the Southern Pacific was to be the *terminal* inland carrier and, of course, the goods had to pass over *other* lines before they reached the places (such as Ogden, Utah) where the Southern Pacific began its route.

We therefore have the following situation: Appellant, desiring (as a forwarder) to send goods of its clients to the Orient and having no facilities for arranging for anything but the inland haul, applied to the Southern Pacific to book the necessary steamer space; that the Southern Pacific agreed to do this, expressly guaranteed the rate and *itself* assumed the duty of clearing the goods; that, in pursuance of its contracts with appellant, it made sub-contracts with C. R. Haley & Co., *not* in appellant's name (which it would have done, had it been a mere agent), but in its own name—"Please book *for the Southern Pacific*"—and, finally, no claim that it was acting as agent and not as principal was made in any of its pleadings. It seems too clear for argument that the contracts of the Southern Pacific Company were absolute and unconditional and in no sense mere agency contracts. If this were not so, appellant's sole remedy would be against any person, however irresponsible, with whom appellee made its sub-contracts (and enough appears from the record to enable us to assert, as is in fact the case, that C. R. Haley & Company was and is totally irresponsible). No authority would seem necessary to support this plain proposition, but we believe that a careful consideration of the case of *Patterson et al. v. Baltimore Steam Packet Co.,* 101 *Fed.* 296 (affirmed in 106 *Fed.* 736), which is a typical case of "liner," or "berth term" booking contracts, will amply sustain our position.

Even on the assumption, however, that the contract was merely one of agency, it certainly is not

true, as stated by the District Court, that "there is no claim of a failure or breach of duty in that regard." It was contended by counsel for appellant at all times that the failure of the Southern Pacific to disclose with whom or on what steamer the bookings were made was a violation of its first duty as an agent and wholly estopped it from relying on the fact of agency (Record, p. 72, and see 2 Corpus Juris 714-715) and the testimony plainly shows repeated failures by appellee to comply with appellant's equally repeated requests to notify it on what steamer or steamship lines the goods were to go forward (Record, pp. 74, 77, 128-138). In the case of the *second* contract, appellee sent appellant a copy of its letter to C. R. Haley & Co., *asking* that concern to make the booking, but it was never confirmed to appellant that the booking *had been made* and, as regards the *first* and *third* contracts, no information as to even the booking with Haley was given (Record, pp. 75-78; 99). Moreover, as before pointed out, appellee did not and could not in law discharge its solemn obligation to reserve space on steamers by peddling out such business to an irresponsible broker.

We therefore contend that there is no question of any agency contract in this case and we pass to the question whether the appellee was restrained either by law or public policy from making the contracts in question, which, after all, is the vital and determinative point in the case.

II.

WERE THE CONTRACTS AGAINST LAW OR PUBLIC POLICY?

In order to answer the above question, it is necessary to first place before the Court the actual facts, even at the risk of repetition. The District Court says that "$10,000.00 damages is claimed for failure to reserve the space or transport the freight described in the first cause of action, and if this liability is enforced, *the obvious result will be that the libelee has transported freight over its own lines in the United States for* $10,000.00 *less than the lawful rate from which it may not depart*" and that the effect of this would be *"to nullify the provisions of the Interstate Commerce Act prohibiting discrimination."*

We can not too strongly assert that the above constitutes an absolute misconception of the true facts of this case. What are those facts? The testimony of Mr. Stubbs, appellee's general freight agent, who made the contracts in question, as to the company's general practice in such cases, is as follows:

> A. We had solicitors on the street in San Francisco, we also had solicitors in various cities in the eastern part of the United States, the more important cities, Chicago, Pittsburg, New York and places like that who were constantly making the round of firms who were known to be shipping either domestic business or foreign business; those shippers were called on for the purpose of soliciting the routing of the business over the Southern Pacific lines, and with respect to export business those solicitors in the course of that solicitation would—I speak

> now of the eastern solicitors more particularly —wire out to our General Freight office in San Francisco to obtain space, that is, ocean space, the ocean rate for a given quantity of tonnage that might be offered to them; the men on the foreign desk, either directly themselves or through the solicitors on the street would make inquiries of various steamship companies, would ascertain from them if they could book these various shipments that were offered; if so for what clearance and at what rate; in other words the usual details; that information would be wired back to the commercial agent or solicitor in the east, and if the space and rate was accepted a confirmation would be sent to us and we would exchange a confirmation with the steamship company for that space and at the rate quoted for that particular shipment. That was the ordinary detail and routine of handling it.
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> Record, pp. 55-56.

In other words the appellee *never* entered into contracts with its customers for reserving ocean space, until it had made a definite agreement for both the space and rate with the steamship line or with some broker (*Id.* pp. 61, 90) and *then* it would quote that rate, *which it had already protected,* to its customers. Mr. Brown, an employee of the Southern Pacific who negotiated one of the contracts, put the situation very tersely when he stated that the ocean space situation in San Francisco at the time was speculative and *that the Southern Pacific did not speculate* (*Id.* p. 93). The evidence further shows that, *before* quoting any booking or rate to appellant, the appellee *actually obtained* that

booking and rate from C. R. Haley & Company (Record, pp. 92; 101).

In other words the appellee in this case did not stand to lose *a single dollar* by quoting a rate of $15.00 a ton to appellant. It simply obtained that rate from a broker, who stood in the place of an independent ocean carrier and *thereby fully protected itself.* If loss came to it through failure to obtain the space contracted for and it thus became liable in damages to appellant, that damage could at once be shifted to the steamship line or broker, from whom it had reserved space, and, in an admiralty proceeding such as this, such steamship line or broker could be brought in as a third party and made to respond to all damages awarded. We fail to see wherein such an arrangement in any way decreased appellee's inland freight rate or wherein it in any way nullified the provisions of the Interstate Commerce Act prohibiting discrimination. It may be said that such contracts *might* lead to discrimination, but these contracts *did not do so* and we are dealing with the facts of this case and not with those of some other case.

Of course it is quite true that, if appellee engaged ocean space with a party who was irresponsible or who would not live up to his contracts, it ran the risk of suffering a loss, but that is equally true of all contracts, whether by land or water, and obviously is beside the point. If C. R. Haley & Company is financially sound, appellee will suffer no loss in this case. If the concern in question is not financially sound, that is a vicissitude which is inherent in all

business transactions and suggests that perhaps ap-appellee was not as careful as it might have been in choosing its associates in this particular transaction. It offers no legal excuse, however, for an admitted breach of contract.

In the light of these admitted facts, we will now proceed to consider the applicable law and determine whether it in any way touches on this case.

The Interstate Commerce Act, passed originally in 1887, and as amended by the Hepburn Act of 1906 and by subsequent Acts, so far as the same is pertinent to the present inquiry, provides as follows:

Sec.1A. " That the provisions of this Act shall apply to . . . any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State . . . . to any other State . . . , and also the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment . . . " (24 Stat. L. 379, as amended by 34 Stat. L.584, 36 Stat. L. 544; see 4 Fed. Stat. Ann. 2 ed. 337).

Sec. 2. (Special rates, rebates, etc., prohibited) "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it *charges,* demands, collects, or receives from any other person or persons for doing for him or them *a like and contemporaneous service in the transportation of a like*

kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty *of unjust discrimination,* which is hereby prohibited and declared to be unlawful." (24 Stat. L. 379; See 4 Fed. Stat. Ann. 2 ed. 371.)

Sec. 6A. Every common carrier *subject to the provisions of this Act* shall file . . . schedules . . . showing rates . . . between points on its own route and points on the route of any other carrier . . . by water when a through rate or joint rate have been established. If no joint rate over the through route has been established ,the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation . . . The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act." (24 Stat. L. 380, as amended by 25 Stat. L. 855, 34 Stat. L. 586. See 4 Fed. Stat. Ann. 2 ed. 406.)

It seems to us self-evident that these provisions do not apply to the case at bar. It will be noted that both Sections 1 A and 2 of the Act, in so far as quoted above, stand exactly as originally enacted in 1887, so that all decisions under the Act are equally applicable now and we contend that there are several decisions holding that contracts such as the instant one are not governed by the Act

The contract in this case is under the Act, if at all, only by virtue of the words italicized by us in our abbreviation of Section 1 A. The carriage was "partly by railroad and partly by water," but the carriage was *not* under a "common control, management or arrangement." The appellee had no interest whatever in the steamer to be employed, but only

a casual relationship thereto as a shipper thereon. The agreement for the water transportation was absolutely independent of the railroad carriage and appellee and C. R. Haley & Company, which stood in the place of the ocean carrier, had no standing agreement, but, as stated, a mere casual relationship.

It seems to be well settled that the Interstate Commerce Act is inapplicable to independent carriers by water. In *Ex parte* Koehler, 30 Fed. 867, 869, Judge Deady said:

> But the interstate commerce act does not include or apply to all the instrumentalities or agencies used or engaged in interstate commerce. It does not include any water craft unless it is used in connection with a railway, "under a common control, management, or arrangement, for a continuous carriage or shipment" from one state or territory of the United States to another, or to or from such state or territory from or to a foreign country.

And in Pacific Mail Steamship Company v. Western Pacific R. R. Co., 251 Fed. 218, 220, *this* Court, speaking through Judge Hunt, said:

> Inasmuch as it is beyond controversy that transportation and traffic by ocean carriers engaged in transportation to nonadjacent foreign countries is not defined or included in the act to regulate commerce, it must follow that the jurisdiction of the Interstate Commerce Commission cannot extend to carriers engaged in such traffic. In Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., *supra,* the Commission recognized the limitations upon its jurisdiction where the question of control over ocean carriers was presented, and announced that the line must be drawn decisively between

those carriers whose rates and practices the Commission could control and those which it could not control, and held that *joint rates could not be made between carriers subject to the act and those not subject to it.* In Chamber of Commerce of New York v. New York Central & Hudson River R. R. Co., 24 Interst. Com. Com'n 55, the Commission, assuming it had no jurisdiction over ocean rates, said that rates to and from ports must be published as independent from the ocean transportation and are subject to the provision of the act to regulate commerce.

In obedience to the limitations referred to, reference may be had to rule 71 of the Interstate Commerce Commission Tariff Circular 18-A (subdivision "b"), wherein the Commission has explicitly declared that ocean carriers between ports of the United States and foreign countries not adjacent *are not subject to the terms of the act to regulate commerce, nor to the jurisdiction of the Commission,* and also to the provision that the inland carriers of traffic exported to or imported from a foreign country not adjacent must publish their rates and fares to the ports and from the ports, and that the rates must be the same for all, regardless of what ocean carrier may be designated by the shipper. The rule further provides that, "as a matter of convenience" to the public, the carriers of inland traffic may publish in their tariffs such through export or import rates to or from foreign points as they may make in connection with ocean carriers; but such tariffs must distinctly state the inland rate or fare as provided by the rules, and need not be concurred in by the ocean carrier, "because concurrence can be required from, and is effective against, only carriers subject to the act." Another subdivision authorized forwarding export and import traffic under through billing, but there must be separation of the liability of the inland and of the ocean carrier, and it must show the tariff rate of the inland carrier.

It would appear to be at once obvious from these cases, if it was not obvious before, that the Southern Pacific Company and C. R. Haley & Company (or in fact any independent ocean carrier) cannot be considered as connecting carriers operating under a "common control, management or arrangement." Each charged its own tariff over its lines and it is apparent that only connecting carriers by water under some sort of permanent arrangement with a railroad are covered by the Act.

In the lower court appellee relied strongly (as did the court itself in its decision) on the case of Hamlen v. Illinois Central Ry. Co., 212 Fed. 324. This was an action at law in the District Court for Eastern Arkansas and it was not appealed and has not since been cited, so far as we are aware, until cited in the case at bar. Not only do we believe the decision wrong and contrary to other cases, but it is readily distinguishable in that (1) through export bills of lading from inland points to Buenos Ayres, including the ocean rates, were issued at the inland points and (2) it was expressly stipulated that the railroad acted only as agent for the steamship line and was not responsible for the steamship carriage (see first paragraph of the decision). In the case at bar, however, the contracts were made *at the seaport,* San Francisco. Liability is absolutely distinct from any bills of lading and no provisions of any bills of lading were pleaded in this case nor did appellee offer any such bills in evidence as a matter of defense. The Hamlen case ruled through bills of lading, including

a low ocean rate, void—this suit is to determine the validity of a *contract to reserve steamer space.*

Moreover, we believe that the Hamlen decision is opposed in principle to two pronouncements of the United States Supreme Court. In Northern Pacific R. R. Co. v. American Trading Co., 195 U. S. 439; 49 L. Ed. 269, 278, that court said:

> "In the case at bar we hold that a special agreement is set forth to forward to Yokohama by the steamer leaving Tacoma on October 30th, 1894. If it had been made by the proper officer of a railroad company in the general course of its business we have no doubt, under the authorities, of the validity of the contract."

And in Southern Pacific Company v. Interstate Commerce Commission, 200 U. S. 536; 50 L. Ed. 585, 593, the same court said:

> It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation. *If it agree to transport beyond its own line, it may do so by such lines as it chooses.* (Citing cases.) This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, *it can do so upon such terms as it may agree upon;* at least, so long as they are reasonable and do not otherwise violate the law. *In this case, the initial carrier guarantees the through rate, but only on condition that it has the routing.* It was stated by the late Mr. Justice Jackson of this court, when circuit judge in the case of Interstate Commerce Commission

v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, *the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits.*"

Squarely oposed to the Hamlen decision and furthermore, strongly in point here is the decision of the Texas Court of Civil Appeals in *St. Louis Ry. v. Birge Forbes Co.,* 139 *S. W.* 3. In that case the defendant railway company contracted to transport cotton from Sherman, Texas, and Ada, Oklahoma, to seaport and thence by "first class liners," for which it would arrange, to Liverpool, and a *through rate* was agreed upon. The freight, however, went forward on second class or tramp ships and the action was for $1,812.00 to refund extra insurance paid in consequence. In affirming a judgment for the plaintiff, the court said:

"It appears that the contract entered into stipulated for a through rate and through shipment of the cotton in question from Sherman, Texas, and Ada, Oklahoma, to domestic seaports, and thence to foreign seaports; appellee having no

contractual relation whatever with the ocean carrier. This being true, *the contract,* we think, *was entirely legal, even though it be true, which does not appear, that the rate paid by appellants for the ocean voyage reduced the inland rate from the point of origin to the domestic seaport.*" . . .

"In the present case the proof, as we understand it, shows that there was no tariff promulgated covering the shipments of the appellee. *And, in view of the fact that the ocean rates are shown to be fluctuating and changing almost daily, it is quite difficult to see how a tariff could be filed covering such shipments as are involved in this case.* In the case of Texas & Pac. Ry. Co., v. I. C. C. 162 U. S. 197, 40 L. ed. 940, V. I. C. Repts. 405, it is held, in effect, that a contract for shipment from a foreign country, even though the proportion of the freight rate for the inland shipment from the domestic seaport to the interior destination in the United States is less than the regular tariff covering shipment between the inland port and such inland destination, does not violate the interstate commission law. If, therefore, a through rate infringing upon the tariff, as in the case referred to, is valid when applied to imports, there seems to be no good reason why it should not be held valid when applied to exports."

The railroad company in the case just cited issued through bills of lading and collected a single joint rate, which *might* tend to show some "common arrangement," whereas, in the case at bar, where two separate contracts are concerned, the transaction is, *a fortiori,* not within the Act. Moreover, in the case at bar, nothing whatever was pleaded or proved as to the nature of the inland contract. The sole contract here in issue was a contract to reserve space *from*

the seaport. The Southern Pacific may or may not have arranged the inland contract, but it was only the *terminal carrier* under that contract. It made no *through* rate, but only a rate from San Francisco to the Orient, which latter it protected by a supposedly valid sub-contract with another party and with no danger of loss if said other party was responsible.

As supporting the Texas decision, above cited we also refer to *Kemble v. Boston & Albany Ry. Co.,* VIII *I. C. Reports* 110 and *Cosmopolitan Shipping Co. v. Hamburg American Packet Co.,* XIII *I. C. Reports* 280-281.

We would further point out that a holding that either a *through* rate or *separate* rates must be filed from inland points to the Orient (unless the inland carrier controls an ocean route) would be not only untenable, but absurd. American rate schedules are voluminous, but can it be seriously contended that rates to all points in the whole world must be included? If the Southern Pacific agent in San Francisco should have been able to thumb his way to a quotation for Yokohama, so should he with equal alacrity quote rates to Tahiti or Apia in the South Seas or Fiume on the Adriatic. The violent variability of ocean rates and the fact that they are admitted by appellee's own witnesses to be *speculative* accentuates the absurdity of such a contention. Through quotations (or even separate quotations) are manifestly only related to ocean lines with which the American carrier has a common standing arrangement or over which it exercises some sort of continuous con-

trol. Nor, may we add, does the Hepburn Act call for schedules comprehensive of the universe.

We have thus far dealt primarily with Section 1 A of the Interstate Commerce Act and think we have shown that the case does not fall within that section and that hence Sections 2 and 6 A of the Act as heretofore quoted have no bearing on the situation. The authorities already cited would appear equally applicable to the two sections last named and a few words as to the effect of those sections would seem sufficient.

Reduced to its pertinent portions, Section 2 of the Act forbids "unjust discrimination," which exists if a common carrier (a) *charge* greater or less compensation than it (b) *charges* or *demands* from another for a like and contemporaneous service. It is to be noticed that these verbs are in the present tense and that *actual injustice and discrimination* only are in terms made illegal. Since infractions of the Act are punishable penally, it is readily apparent that *actual* and not *potential* discrimination is aimed at. No deliberate effort to rebate indirectly is imputed by the appellee to itself. On the contrary it is obvious that a fulfillment by the ocean carrier of its agreement made with the railroad for ocean transportation could not possibly have resulted in a loss to the railroad. Hence, even upon the argument employed by the court, no discrimination could in such event possibly arise. A loss to the railroad could only take place upon a concurrent happening of all the following contingencies:

1. That the ocean carrier failed to fulfill its space engagements;
2. That there was not available to the railroad similar ocean space at similar rates;
3. That the ocean carrier was financially irresponsible and unable to respond in damages to the railroad for its breach of contract.

Certainly it cannot be said that an agreement under such circumstances can be branded as illegal on the grounds of being discriminatory. It is not discriminatory in its inception and the possibility that a discrimination can result from it is not only highly uncertain, but extremely speculative. Other forwarding agents or shippers, for aught that appears, could at the same time have received a like service. It is intimated in the Hamlen case that the service of a railroad in booking goods for export and guaranteeing the rate "is an unusual service and not equally open to all," but the facts in the case at bar show on the contrary that it was *not* an unusual service and that it *was* equally open to all (See evidence of Stubbs heretofore quoted. Record, pp. 55-56.) In fact commerce today is being fostered by just such assistance rendered by carriers in booking foreign shipments on steamers beyond their seaport terminals and there is testimony in the record to show, as the court itself probably well knows, that it was "the universal custom" (Record, p. 105). In the light of this testimony and of the decisions of the United States Supreme Court heretofore cited, we fail to perceive wherein the service in question was "unusual" or wherein it was in any way discriminatory.

Turning now to Section 6A of the Act, we think we have already plainly established that this is not a case where any "through rate or joint rate have been established." The section further provides that, where no joint rate has been established "the several carriers in such through route shall file . . . the separately established rates . . . applied to such through transportation." The case at bar cannot come within this provision because of two facts. In the first place, the final carrier concerned was here a steamship company and not within the purview of the Act or the control of the Interstate Commerce Commission (See *Ex parte* Koehler, *supra;* Pacific Mail v. Western Pacific, *supra.*) In the second place, the record demonstrates that this was not a through transportation. The appellee was only *one* of the inland carriers and not the initial carrier at that, and its contract was a contract to reserve steamer space at a rate which it guaranteed. And, after all, Section 6A of the Act, as its closing sentence indicates, merely applies to carriers within Section 1A of the Act and has no separate sanctity standing alone.

One other point should be noticed, which was made in the Hamlen case, (although it was not made in this case in the briefs in the lower court) and that is the possible claim by appellee that its contract was *ultra vires*—that, as a *railroad* carrier, it had no power to guarantee an *ocean* rate, as the evidence shows it did in this case. It would seem to us to be elementary law that a claim of *ultra vires* must be both pleaded and proved by the party setting it up and there was

no such pleading or proof in this case. On the contrary the evidence is that appellee and other railroads were continually making contracts for ocean space and are doing so today and that it is "the universal custom." Furthermore, the United States Supreme Court has, as already noted, expressly said that railroad carriers have the right to make such contracts and they undoubtedly had that right at common law.

If the lower court's decision is sustained in this case, the railroads will be in an enviable position. Such contracts will then be void, but they will continue to be made and no prosecutions can be expected, as there have been none in the past. The railroads will simply be able to do as they have always done, with, however, the privilege of avoiding the contracts when convenient; in other words, doing what has now unfortunately become a common and alarming practice among supposedly reputable business men—"welching" (we dislike to use this term, but no other expresses the situation). As a matter of real fact, public convenience and business are served by these contracts and to take away the right to make them would involve commercial hardship. Public policy is better served by allowing them than by holding them void.

CONCLUSION.

The record shows that appellee in this case has broken its absolute contract to reserve steamer space at a rate which it guaranteed. It also shows that appellee does not stand to lose one dollar by carrying

out its contract, unless through its own carelessness in making its sub-contract with an irresponsible party. The contract was not against public policy, but was of mutual advantage and actually *favored* by public policy. The transaction was not within the purview of the Interstate Commerce Act, nor would it have been thereby invalidated, as it involved no unjust discrimination and the filing of either a through or separate rate was wholly impracticable in view of the constantly changing shipping conditions and was not prescribed by the Act. The contract was not one which the railroad could not make, but was one which railroads always have made and which they are still making today and without the assistance of which, distant shippers would be helpless.

It is therefore submitted upon the whole case that the decree of the District Court should be reversed and that said court should be instructed to enter an interlocutory decree in favor of the libelant, with interest and costs, and that the case should be referred to a Commissioner to ascertain the damages, appellant also to recover its costs on this appeal.

Dated: San Francisco, April 25, 1921.

Respectfully submitted,

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S. HASKET DERBY
H. W. GLENSOR
ERNEST CLEWE
CARROLL SINGLE.

Proctors for Appellant.

No. 3656.

United States Circuit Court of Appeals

For the Ninth Circuit.

BALDWIN SHIPPING COMPANY, INC., a Corporation,	*Appellant,*
vs.	
SOUTHERN PACIFIC COMPANY, a Corporation,	*Appellee.*

BRIEF FOR APPELLEE, SOUTHERN PACIFIC COMPANY.

GEO. K. FORD,
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Mills Bldg., San Francisco,
Proctors for Appellee.

No. 3656.

United States Circuit Court of Appeals

For the Ninth Circuit

BALDWIN SHIPPING COMPANY, INC., a Corporation,	*Appellant,*
vs.	
SOUTHERN PACIFIC COMPANY, a Corporation,	*Appellee.*

BRIEF FOR APPELLEE, SOUTHERN PACIFIC COMPANY.

THE FACTS

The appellant is a corporation engaged generally in the freight forwarding business. The appellee is a common carrier by rail engaged in interstate commerce and subject to the provisions of the Interstate Commerce Act of 1887, amended by the Elkins Act of February 19, 1903, and the Hepburn Act of 1906.

The Pacific Coast terminal of the appellee is San Francisco. For the purpose of obtaining the inland haul on freight destined for Oriental export, and as an accommodation to shippers using its lines for this class of freight, the appellee made a practice of reserving for such freight, steamship space for the ocean carriage at the best available rates.

In June, 1917, the appellant requested the appellee to reserve steamship space for a quantity of steel articles for shipment to Japan. The requests that reservation be made involve three separate transactions, all similar in nature, aggregating space for 5250 tons. The appellee neither operated steamers on its own account nor had a traffic agreement or through tariff arrangement with any ocean carrier. It endeavored to book the space in the open market.

The record shows that at this period, Oriental freight space was difficult to obtain, either directly from the steamship companies or through brokers who had previously booked space and had the space for sale.

When the requests for booking were made in this case, the appellee immediately investigated available sources of ocean space and found that C. R. Haley Co., brokers, with whom it had conducted similar transactions, could supply the required space. The space was thereupon reserved, the freight booked, and the appellant notified of what had been done.

For reasons undisclosed in the record, this freight did not move from San Francisco when it arrived, and the appellant claims to have been compelled to pay a higher rate than that engaged through the appellee. The difference in the two rates is the amount in dispute.

Under this state of facts the appellee disclaims liability upon two distinct grounds: *First,* that it acted only as the agent of the appellant in booking the freight, and as booking was actually secured, its obligations in the transaction were entirely fulfilled; *second,* that if it is held to be a principal, the agreements were void as being in violation of the Interstate Commerce Act, heretofore referred to.

The District Court sustained both of these propositions. The appellee takes no different position here than it did in the Court below, and insists that its position and the opinion of the District Court are unassailable as having a sound basis, both in law and fact.

The Southern Pacific Company Acted Merely as the Agent of the Appellant in Booking This Space, and It Fully Performed Its Obligations in This Regard

At the outset of the discussion on this branch of the case, attention is directed to the pleadings. The charging allegations in all three counts of the libel are in identical terms. Referring to that in the first count (Record 7), this language is used:

> "That heretofore, to-wit, on or about the 22d day of June, 1917, libelee agreed with libelant to reserve steamer space for the transportation of and to transport or caused to be transported from San Francisco, California, to Japan, etc."

The alleged breach is pleaded in this language:

> "That libelee did not reserve steamer space for said commodity, or any part thereof."

The answer denies specifically the allegations or the libel, and denies that steamer space was not reserved (Record 15).

No attempt whatever was made in the proof to support the allegations to the effect that any agreement was made whereby appellee agreed to itself transport or cause to be transported the commodity mentioned. The breach of contract claimed, both in pleadings and proof, was a failure *to reserve* steamer space. A recovery must be predicated upon an alleged failure of the appellee to engage ocean cargo space.

The record shows that this space was in fact reserved and engaged by appellee. As the proof was being offered, this admission was made by libelant (Record 92):

> "Mr. GLENSOR. I have no objection to admitting that the Southern Pacific Company actually booked this stuff with C. R. Haley, that is, they made a sub-contract, made a contract on their own account with C. R. Haley."

This admission merely covers what the witness Boyson testified to at Record, pages 96, 97, where he stated that in each instance after talking to Miss Green, who placed the orders for appellant, he obtained and reserved steamer space from C. R. Haley Company.

The record shows that it was the practice in filling orders for booking such as that given by the appellant, to secure space if possible from the steamship companies direct, and if the companies

did not have the space, to place the order with brokers who did. At this time it was necessary in order to get space to place it with a broker (Record 90). It was the general practice to secure this space through the best available source (Record 93, 94). At this particular time no ocean space was available except through brokers (Record 97, 101, 102). Previous bookings had been made with the Haley Co. (Record 102).

Passing for a moment the question of agency, appellant claims that in actually reserving ocean steamer space in conformity with the requests received with a recognized agency having space for sale, everything was done which the law required the Southern Pacific Company to do. The record shows that the space was in fact reserved from a firm which had space to sell, and with whom previous dealings had been consummated. The libel alleges the failure to do something which it affirmatively appears was done. The lower Court so held. Certainly it could not for a moment be found on the record before the Court that steamer space on all three transactions was not engaged by the appellant. Wherein was there a breach?

But at best the appellant merely acted as the agent of the Baldwin Shipping Company in booking this freight. The appellant neither owned nor operated steamers engaged in this trade, or in any Pacific Coast trade. It published no tariff covering ocean freight (Record 88). The reservation of

space was done as an accommodation to shippers using its lines.

It is admitted in appellant's brief at page 8 that the transaction involving the reservation of ocean space was entered into by the Southern Pacific Company, because that company was to receive the inland haul on the freight to the port of export. The record bears out this admission in the statement of Mr. Stubbs at pages 55 and 56 of the record and the testimony of S. W. Brown (Record 94) where appellant's counsel directly asked the question:

> "Q. The idea back of the booking of this space was to get this stuff to move over your railroad to San Francisco, was it not?
>
> A. Generally speaking, yes."

The practice regarding these bookings is shown by the same witness at page 93 in this language:

> "The Southern Pacific would book space directly with the steamship company, if possible, and if not they would help their clients by booking it with brokers, but it was generally understood that the space was to be secured through whatever source was possible."

The letters advising the appellant that the bookings were made, themselves show an act done for the benefit of the shipper, not the appellee. Thus the first letter (Record 22):

> "We have booked for your account 2000 tons of pig iron, etc."

Appellant seeks to overcome the legal effect of the arrangement entered into by a claim that the appellee is estopped from claiming agency on the ground that it had concealed a material fact in its transaction concerning the subject-matter of the agency. The attempted estoppel was neither pleaded nor proved. It is based upon an assertion that the Southern Pacific Company refused to advise the Baldwin Company what steamer or steamship line the goods had been booked on.

There is no basis for such a contention. An agent certainly cannot be charged with a violation of duty to his principal by failing to disclose what he himself did not know. The record shows that in each instance the appellee advised appellant of everything that had transpired.

The testimony shows that in all of the contracts the Baldwin Company was given all of the information the appellant had. The contracts involved in the first and second causes of action are known as Nos. 607 and 608. These two contracts were booked by Mr. Boyson, an employee of appellee, and were in his handwriting (Record 98). He testifies as follows:

> "Q. You handled some of these transactions? A. Yes.
>
> Q. Did you come in contact with Mrs. Green? A. Not personally.
>
> Q. Did you talk with her, if you know, about making these bookings?
>
> A. I talked with the lady of the Baldwin Shipping Company's office.

Q. You did not go to the office, though, to see her? A. No.

Q. Was it over the telephone?

A. Over the telephone.

Q. Then you followed up this conversation by engaging this space and writing that you had done so? A. Yes.

* * * * * * * * * *

Q. Did you know what steamers at the time in June, when you engaged this space, it was to be shipped on?

A. *I had no information on that point.*

Q. Was it possible for you to get the information?

A. On repeated requests on Mr. Haley, he failed to give it to me.

Q. *Did you then give the Baldwin Shipping Company all the information you had on the subject?* A. *I did.*

Q. Were these transactions all handled in about the same way?

A. About the same manner."

In the case of the contract involved in the third cause of action which is known as No. 613, not only was the appellant notified, but a copy of the confirmation of the order to Haley Company was sent appellant. This letter is Exhibit 5, page 126, and testified to as having been received on the day the letter in Exhibit 6, page 127, was written. The witness Roche actually handled this item for

the appellee and says that the booking was confirmed to the Baldwin Shipping Company (Record 101).

From this evidence it appears that the Southern Pacific advised the appellant how and with whom the bookings in each case was made; that it *could not* supply data as to steamer or date of sailing because it did not have it; that it did give the Baldwin Shipping Company *all of the information* it had or could get on the subject of these bookings.

There certainly was no objection from the appellant that these bookings had been made with a broker rather than a steamship line, and there can be no question about written notice of the steps taken being given with reference to contract 613. The copy of appellee's letter to the broker (Exhibit 5, p. 126) which the Baldwin Company admittedly received, refers to contract 613. This same number appears in appellant's letter to appellee of the same date (Exhibit 6, p. 127), conclusively showing the identity of the transaction as understood by appellant.

In discussing this branch of the case it should be pointed out that the appellee never did more than agree to *book* this space (Exhibits 1, p. 121; 3, p. 123; and 5, p. 126). There was no limitation as to where it should be booked. This being the case it could be placed with any reliable source having such space to offer. It should be particularly noted that appellant's replies to the letters

advising that bookings had been made do not follow the terms of the original notices.

Nothing was ever said or done by the appellee with respect to a guarantee to protect the rate. The Baldwin Company insert this alleged guarantee in its letters and ask an acknowledgment which was never received. As pointed out *by the court* below, these letters of the Baldwin Company referring to a guarantee *are no part of the contract,* and merely express its interpretation of the agreement (Record 100).

The contention of appellant that appellee is estopped from making the claim of agency, admits that an agency existed. The claim of estoppel has no foundation in fact. There was no concealment of any material or other fact surrounding these transactions. The bookings having been made in accordance with the agreement, to the knowledge and apparent satisfaction of the appellant, we see no basis for a claim that the agent by any act involved itself in an individual liability.

If the Southern Pacific Company was acting only as the agent of appellant, a position which we maintain, and which is admitted by the claim of estoppel, there is nothing in the record to warrant a finding that the conditions of the agency were not entirely fulfilled. If the appellee was not the agent, still its contract was performed in making the bookings as agreed, for there is neither contention or proof that the Southern Pacific Company udertook to

transport the freight or do anything more than reserve ocean steamship space for it.

It is to be observed that a decision on the question of agency involves in some measure an issue of fact. Upon the subject of whether or not notice of all steps taken by the appellee was given to appellant, there is a sharp conflict in the testimony. All of the witnesses on this question appeared in person in the court below, and its finding should be conclusive on matters of fact in dispute. This rule is well settled. *1 Corpus Juris,* 1351, and the decisions of this Court of which *Petersen* vs. *Larsen,* 177 Fed. 617, is typical. There it is said:

> "On appeals in admiralty, when questions of fact depend on conflicting evidence, the decision of the District Judge who had an opportunity to see the witnesses and judge their appearance, manner and credibility, will not be reversed unless its clearly appears that the decision is against the evidence."

Also to the same end see:

Reed vs. *Weule,* 176 Fed. 660;
United S. S. Co. vs. *Hoskins,* 181 Fed. 962.

The Contracts Are Void as Being in Violation of the Interstate Commerce Act.

If the opinion of the court below on the subject of agency, which is in accord with the views herein expressed, is erroneous, then the contracts are invalid as a plain violation of the Interstate Commerce Act of 1887 and the amendments thereto. Unquestionably the Southern Pacific Company

could, as it did, act by way of accommodation as the agent of the appellant in making these bookings. More than this it could not do. As was said in *Hamlen* vs. *Illinois Central R. R. Co.*, 212 Fed. 324, a case later discussed at length:

> "All that can be claimed is that it is liable on its guaranty to secure the rate of $9.00 per long ton from New Orleans to Buenos Aires. But it had no right to make such a guaranty.
>
> That it arranged for transportation at that rate is admitted, *and that is the most it could lawfully do.*"

Furthermore, if the contract is open to two constructions it should be given that which would make it lawful, as it is presumed that the law has been obeyed (Civil Code 1963, Sub. 33).

Appellant in its brief makes a feeble contention which it is difficult for us to follow, to the effect that the appellee was not within the terms of the

Act. Section 1A of the Act provides:

> "That the provisions of this Act shall apply to * * * any common carrier * * * engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control * * * from one state * * * to any other state."

It is admitted that the Southern Pacific Company is a common carrier engaged in the transportation of passengers and freight by railroad between

states. This admission, together with one to the effect that *no tariff for this service was on file,* is found at Record, papes 72, 73, and also at page 67, where the following appears:

> "Mr. FORD: * * * The libel simply alleges that the Southern Pacific Company is a corporation. We desire to have an admission that it is a corporation engaged in interstate commerce, carrying freight and passengers within the United States.
>
> Mr. GLENSOR. It will be so admitted."

The Act provides that its terms shall apply to certain designated carriers. It is admitted that the appellee is within at least one of the designated classes. How can it now be seriously argued that the Act does not include the Southern Pacific Company?

We have no fault to find with the authorities cited to the effect that the Act does not apply to an independent ocean carrier. We are not here dealing with an independent ocean carrier, we are dealing with the corporate activities of a carrier designated in the Act, and whose rights and powers are prescribed by that Act. We concede the correctness of both *Ex Parte Koehler,* 30 Fed. 867, and *Pac. Mail S. S. Co.* vs. *Western Pac. R. R. Co.,* 251 Fed. 218.

The exact situation herein involved was presented in *Hamlen* vs. *Illinois Central R. R. Co.,* 212 Fed. 324. We quote from the agreed statement of facts in that case as follows:

"The case was submitted on an agreed statement of facts, which shows that the agent of the Illinois Central Railroad Company approached the plaintiff and asked for the shipments over its line to New Orleans, and agreed that the railroad company would undertake to get a rate for the ocean freight; that it arranged with the Pan-American Steamship Line, which at that time had steamers plying between the ports of New Orleans and Buenos Aires, to carry the freight at $9.60 per long ton, and so informed the plaintiff; that but for this fact the plaintiff would not have routed its freight over the defendant's line, but would have sent it by way of New York; that the goods were safely carried to New Orleans, and there delivered at the place designated in the bill of lading, the pier of the Pan-American Steamship Line, but when it arrived there the steamship line had become bankrupt and ceased to run its ships; that the defendant immediately notified the plaintiff of that fact, and thereupon the freight was taken to the port of Mobile and there reshipped at a higher rate than had been contracted for with the Pan-American Steamship Line; that for one of the shipments the the plaintiff had prepaid to the defendant the ocean freight, amounting to $247.67. It was also agreed that the defendant had never published or filed with the Interstate Commerce Commission a through rate to Buenos Aires."

It is at once apparent that the defendant in the *Hamlen* case did exactly what the appellee here is alleged to have done, namely, to obtain cargo space at a given rate, on an ocean-bound carrier at the port at which the rail transportation terminated. The contract did not include an agreement for the entire haul, land and water, or for *through* trans-

portation. There as here the railroad did engage space but through some cause beyond its control the same never became available to plaintiff who of necessity engaged other space at a higher rate. There is not a hair line differentiation to be made between the two cases on the facts.

The evidence in this case shows that the reason for respondents attempting to secure steamer space was prompted by its desire to handle the inland haul.

That the making of agreements to charter space, if enforceable, violate the plain provisions of the Hepburn Act, and would permit unlimited discriminations, is too plain for argument. For instance, several shippers in Chicago desire to ship goods to San Francisco for export to the Orient. In order to get the business of the largest shipper, a railroad offers to secure steamer space at $5.00 a ton below the market rate. The railroad accepts a loss of $5.00 on the ocean contract, charges this off against its freight income from the inland haul with the result that the large shipper has in fact obtained a rebate of $5.00 a ton over his smaller competitor, and has not in fact been charged the full published rate. Instances where contracts such as this could be made to work a similar violation could be multiplied beyond number.

No more persuasive language in support of this unassailable position could be found than that con-

tained in the opinion in the *Hamlen* case, disposing of both points herein urged. There it is said:

> "First. A railroad company has no power unless expressly, or by necessary implication, authorized by its charter, to guarantee the performance of duties by another carrier, and there is no evidence that the defendant is so authorized. It is true that a carrier may, at common law, lawfully enter into a contract for the carriage of freight over connecting lines by issuing a bill of lading whereby it undertakes absolutely to carry and deliver a shipment to a destination on another line, but there was no such contract here. *All that can be claimed is that it is liable on its guaranty to secure of $9.60 per long ton from New Orleans to Buenos Aires. But it had no right to make such a guaranty. That it arranged for the transportation at that rate is admitted, and that is the most it could lawfully agree to do.*

The cases relied on by counsel for the plaintiff (*Northern Pacific R. R. Co.* vs. *American Trading Co.,* 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269, and *Southern Pacific Co.* vs. *Interstate Commerce Com.,* 200 U. S. 536, 26 Sup. Ct. 330, 50 L. Ed. 585), may be distinguished on the facts, but that is unnecessary, as both of these cases arose and were determined by the Court prior to the enactment of Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 584, 586. Section 2 of that act amends section 6 of the former act so as to read as follows:

> 'That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for trans-

portation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation.'

It then proceeds to prescribe how the schedules shall be prepared and filed.

As it is not contended that any through rate to Buenos Aires was ever filed by the defendant, it could not indirectly assume a liability which the law prohibits it from assuming directly. The ocean rates were not required to be published, and, for reasons stated *in re* Export and Domestic Rates, 8 Interst. Com. Com'n R. 214, 276, *re* Tariffs and Export and Import Traffic, 10 Interst. Com. Com'n R. 68, and *Armour Packing Co.* vs. *United States,* 209 U. S. 78, 28 Sup. Ct. 428, 52 L. Ed. 681, could not properly be made.

Second. If such contracts were permitted, their effect would be to nullify the provisions of the Interstate Commerce Act prohibiting discrimination, for by guaranteeing a lower rate on the foreign line, the difference, if any, would have to be paid out of the earnings of its own line, resulting in a lower rate than that published and charged to other shippers for the carriage of freight over the lines of the railroads, and a lower rate than that specified in its schedules filed with the Commission. *Armour Packing Co.* vs. *United States,* 209 U. S. 56, 78, 28 Sup. Ct. 428, 52 L. Ed. 681.

Any contract by which a carrier of interstate freight assumes a more burdensome liability than is specified in the published schedules is a violation of the Interstate Commerce Act and void. *C. & A. R. R. Co.* vs. *Kirby,* 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033; *Clegg* vs. *St. L. & S. F. R. R. Co.,* 203 Fed. 971, 122, C. C. A. 273; *C. C. C. & St. L. R. R. Co.* vs. *Hirsch,* 204 Fed. 849, 123, C. C. A. 145. In the *Kirby* case it was held that a carrier cannot legally contract with a particular shipper for an unusual service, unless it makes and publishes a rate for such service equally open to all. To guarantee a certain rate from New Orleans to Buenos Aires to one shipper was certainly an unusual service, and not equally open to all, for it had never been published.

Nor is it an excuse that the plaintiff did not know what rates had been published by the railroad company, and that it relied upon the representations of the agent of the company. It has been authoritatively determined that a shipper is conclusively presumed to have that knowledge. *K. C. S. Ry. Co.* vs. *Carl,* 227 U. S. 639, 653, 33 Sup. Ct. 391, 57 L. Ed. 683. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. *Illinois Cent. R. R. Co.* vs. *Henderson Elevator Co.,* 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290."

In this connection see also *Saitta & Jones* vs. *Penn. R. R. Co.,* 179 N. Y. S. 471, in which case a collection of the authorities is made, and also *Pacific Fruit & Produce Co.* vs. *Northern Pac. Ry.,* 186 Pac. 852, where this language is used:

"A carrier in interstate commerce can enter into *no contract of transportation* for which

there is not express authority in its filed and published tariffs."

Admittedly there was no filed or published tariff for the ocean rate herein undertaken to be obtained by respondent, and as a consequence no action will lie for the failure upon part of respondent to secure the space reservations, or transport the freight after the same had been made.

Appellant attempts to distinguish the *Hamlen* case on two grounds. The first is that the bill of lading was designed to cover the whole haul. The Court in its decision points out that plaintiff claimed a recovery on the alleged guarantee relative to ocean space *alone,* and the decision deals with the case from this standpoint. The second ground of distinction sought to be made is that there the export bill of lading expressly stipulated that the carrier was acting only as agent for the connecting line. This distinction does not enter into the Court's determination on the merits of the case, and has no bearing here, as the question of whether or not the Southern Pacific Company was an agent or principal is not determined by stipulation or written agreement, but is a legal conclusion to be drawn from the proven facts.

Two decisions are cited, claimed to be opposed in principle to the *Hamlen* case. These are *Northern Pac. R. R. Co.* vs. *American Trading Co.,* 195 U. S. 439, and *Southern Pacific Co.* vs. *Interstate Commerce Commission,* 200 U. S. 536. Both of these

cases are cited in the Hamlen decisions and as there pointed out, can be distinguished. In the first mentioned case the contract involved a through shipment to the Orient on a connecting oceanic transportation line, and on a rate equally open to all. The second case merely holds that it was the right of the initial carrier, after a rate from one point to another had been established, to designate the routing of the freight. Here again the same quoted tariff was open to every shipper. As pointed out in the last mentioned case, contracts by carriers can be made as before the act, "at least so long as they are reasonable and *do not otherwise violate the law.*" Both cases were decided prior to the enactment of the Hepburn Act of June 29, 1906, 34 Stats. 584, 586, requiring the filing and publication of a tariff covering all transportation charges made by a carrier subject to the act.

St. Louis Ry. vs. *Berge-Forbes Co.,* 139 S. W. 3, would appear to be opposed to the *Hamlen* case. It is a state court decision, never since followed, ignored in the *Hamlen* case, and contrary to the spirit and purpose of the Hepburn Act. A careful examination of the case will show that the matter of the illegality of the contract was *not an issue* and was *not pleaded* nor properly before the Court. What is there said on the subject of legality is wholly superfluous to a decision of the issues framed by the pleadings.

The Supreme Court of the United States has passed upon the effect of failure to publish rates for service as affecting the validity of a contract.

In *Chicago & Alton R. R.* vs. *Kirby,* 225 U. S. 155, a shipper attempted to recover damages for breach of a contract to carry a carload of horses upon a certain train, with a guaranteed time of arrival. The Supreme Court held this contract void, as involving a special service not disclosed by its tariffs. In commenting upon the scope and purpose of the act in question the Court used this language:

> "An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not open to all others in the same situation."

The purposes of the act have been defined in the same case in terms about which there can be no mistake. The act was designed to prohibit all means that might be resorted to to obtain rebates or concessions. At page 165 of the decision we find this definition of purpose:

> "The Elkins Act procedeed upon the broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions *should be the one established, published and posted as required by law.* It is not so much the particular form by which or the motive for which this purpose is accomplished, but the intention was to prohibit any and *all means* that might be resorted to to obtain or receive concessions and

rebates from the fixed rates, duly posted and published."

The opinion of Judge Rudkin in the case at bar expresses more clearly and concisely than can counsel the iniquities which would follow the sustaining of a contract of this nature. Would this Court for a moment countenance an agreement whereby in consideration of the Baldwin Shipping Company shipping its freight over lines of the appellee, the appellee would in turn give the shipper free office quarters in its San Francisco building? Attempts by indirection to circumvent the law have been condemned in numerous cases such as that of *C. & St. Louis Ry. Co.* vs. *Hirsch,* 204 Fed. 849, where a rent rebate was attempted, and *Clegg* vs. *St. L. & S. F. R. R.,* 203 Fed. 971, where an agreement to buy coal at a fixed rate was the form adopted.

In the case at bar the appellee disclaims any endeavor to violate the law. It maintains the legality of the contracts as ones of agency, but denies that they were ever intended as guarantees of a fixed rate for ocean transportation, and insists that if such a construction is placed upon them, they are void as a flagrant violation of the plain provisions of the Acts in question.

Appellee most respectfully submits that the decision of the District Court is unimpeachable upon both the grounds assigned in the opinion and should be affirmed.

Respectfully submitted,

GEO. K. FORD,
ELLIOTT JOHNSON,
Proctors for Appellee.

No. 3656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALDWIN SHIPPING COMPANY, INC.
(a corporation),
Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellee.

APPELLANT'S REPLY BRIEF.

E. B. McCLANAHAN,
S. HASKET DERBY,
H. W. GLENSOR,
ERNEST CLEWE,
CARROLL SINGLE,
Proctors for Appellant.

No. 3656

IN THE

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(a corporation),

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Appellee.

APPELLANT'S REPLY BRIEF.

There are a large number of misleading statements in appellee's brief in this case and the main purpose of this reply is to clear these up and put the situation *as it is* squarely before the court.

I. THE QUESTION OF AGENCY.

It is repeatedly stated by appellee—sometimes directly, but usually by inference—that the lower court sustained appellee's contention that it acted merely as an agent and hence that this finding,

based on conflicting testimony, should not be disturbed. There was, however, no such holding. What the court held was that "*if* the libelee was a mere agent to reserve steamer space, there is no claim of a failure or breach of duty in that regard". The court did not pass on the question of whether appellee was in fact merely an agent, and, moreover, there is no conflicting testimony on this point. The question is, therefore, one for this court to decide as an *original* question, unhampered by any previous ruling.

As to the finding that, *if* appellee acted as a mere agent, "there is no claim of a failure or breach of duty in that regard", we have already pointed out that this is absolutely contrary to the record (see pp. 70-72) and it was, doubtless, an inadvertent misstatement. Appellant's briefs in the lower court (which are still available) plainly show that there *was* such a claim.

On page 3 of appellee's brief there is a *partial* statement of the pleadings, by which it is sought to be shown that the only breach of contract averred was the failure to go through the *mechanical* act of reserving steamer space. A fuller quotation of these pleadings is therefore appropriate:

"III.

"That, heretofore, to wit, on or about the 22nd day of June, 1917, libelee agreed with libelant to reserve steamer space for the transportation of and to transport, or cause to be transported from San Francisco, California, to Japan, two thousand (2000) tons of pig iron and steel articles, inexcessive sizes, for late July, August

and September 1917, clearance, at the rate of $15.00 per ton, weight or measurement ship's option."

"IV.

"That libelee did not reserve steamer space for said commodity or any part thereof."

"That at divers and various times during the three months, July, August and September, 1917, libelant tendered to libelee said two thousand (2000) tons of pig iron and steel articles, inexcessive sizes, *for transportation* to Japan, *and demanded* steamer space for the transportation of and *the transportation thereof* from the port of San Francisco to Japan, *but libelee failed, neglected and refused to accept said commodity, or any part thereof, for transportation, or to transport said commodity, or cause it to be transported, or to furnish or supply steamer space for the transportation thereof, or any part thereof,* in accordance with the terms of said agreement or at all."

Record, p. 7 (italics ours).

The lower court recognized that these allegations fully covered the case (Record, pp. 108-109) and it is ridiculous to say, as appellee does, that no attempt was made to support these allegations. We contend that appellee's obligations under its contracts went much further than the mere mechanical *booking* of space with an irresponsible broker and we feel sure that the court will hold with us on this point.

It is weakly contended by appellee that it gave appellant *"all the information it had"*, and it is plainly intended that the court should *infer* that appellant was kept fully posted as to all of the ne-

gotiations with C. R. Haley & Company. Nothing could be farther from the truth. The assertion is based almost solely on the following leading question to the witness Boyson and his answer thereto:

> "Q. Did you then give the Baldwin Shipping Company all the information you had on the subject? A. I did."
>
> Record, p. 98.

In the light of the above the following cross-examination of this witness is interesting:

> "Mr. GLENSOR. Q. Mr. Boyson, have you an independent recollection of these three contracts, 608, 607 and 613?
>
> A. *I happened to review the files a couple of years ago,* and it is my recollection that I only booked one of these particular contracts.
>
> Q. Which one of them?
>
> A. I could not say, without referring to the files.
>
> Mr. FORD. Show him 613.
>
> Mr. GLENSOR. I think book 2; I am not sure. I will show you 607 and 608.
>
> Q. Who was J. N. H.?
>
> A. A party by the name of Mr. J. N. Harper.
>
> Q. Are these two contracts booked by you?
>
> A. Yes, that is my writing.
>
> Q. Now, I call your attention to the fact that the one here booked by J. N. Harper was booked in the form of a letter to C. R. Haley & Co., with a carbon copy to the Baldwin Shipping Co.? A. Yes.
>
> Q. While the two that were booked by you were booked by letter direct to the Baldwin Shipping Co.? A. Yes.
>
> Q. You see that? A. Yes.

Q. *Now, are you still willing and ready to swear that you notified the Baldwin Shipping Co. that you booked these contracts with C. R. Haley & Co.?*

A. *According to these two contracts that I made there I did not notify them that I made the contracts with C. R. Haley.*

Q. The third contracts was actually made by Mr. Harper? A. Yes."

Record, pp. 98-99. (See also Record, pp. 74, 77.)

Only in the case of *one* of the contracts was appellee's letter to C. R. Haley sent to appellant and, even as to this, the witness Roche only says "I *think* it was confirmed to the Baldwin Shipping Co." (Record, p. 101). Appellee, therefore, did *not* give appellant "all of the information it had", but gave it *no information whatever* (see Record, p. 74). Moreover, we hardly think that the court will hold that appellee could take the supine position of *having no information* and therefore *giving none*. Anyone can book space with an irresponsible broker on an *unknown* ship or by an *unknown* line. The assertion that Haley "had previously booked space" or "had space to sell" is, to put it mildly, a hyperbole. It is very clear from the record that he *had no space* and was merely *speculating* in it. Appellee's witness Brown admits that the ocean space situation at that time was "speculative" (Record, p. 93), and Mrs. Green well describes Mr. Haley when she says that "it was my impression that

Mr. Haley booked almost everything he could book" (Id. p. 79).

Appellee states in its brief that "nothing was ever said or done by the appellee with respect to a guarantee to protect the rate" (Brief, p. 10), and that the letters from the Baldwin Shipping Co. *confirming* the making of such guarantee *are no part of the contract* (Id). Counsel forgets that these letters merely purport to *confirm* previous *verbal* arrangements and if these letters did not correctly state what those arrangements were, it was the duty of appellee to have promptly notified appellant of that fact and appellee will not *now* be heard to deny that such was in fact the understanding. The letters of appellee and appellant constitute the contract and must be read together and so read they plainly show a *guarantee* of the rate in question. Moreover, as pointed out in our main brief, this understanding is borne out by the telephone conversations (Record, pp. 41, 74).

We submit that it is too clear for argument that the appellee contracted as a *principal* and not as an agent and further that, even if it did act as agent, it was a very supine agent and violated all the essential duties of a *faithful* agent. So much, too much doubtless, as to the question of agency, which should never have been injected into this case.

II. THE CONTRACTS WERE NOT VOID.

We can add little to what is said in our main brief on this subject. Appellee relies almost solely on the Hamlen case, as was to be expected. We believe that that case can be and has been successfully distinguished, but we also take the much firmer ground that the decision is *wrong* and should not be followed.

We do not think that the explanation made in the Hamlen case of *Northern Pacific R. R. Co. v. American Trading Co.,* 195 U. S. 439, and *Southern Pacific Company v. Interstate Commerce Commission,* 200 U. S. 536, is *at all* adequate. The only ground of distinction is that these cases were decided prior to the passage of the Hepburn Act. But, as pointed out in our main brief, Section 1A of the Interstate Commerce Act was *unchanged* by the Hepburn Act, and, if Section 1A does not apply, then neither has Section 6A (requiring the publication of rates by carriers *"subject to the provisions of this Act"*) any application. Hence, the alleged distinction is no distinction at all and the two Supreme Court decisions are as much in point today as they ever were. It is quite true that the Southern Pacific Company is, in many respects, subject to the Act, but what it did (or promised to do) in this case *is not prohibited by the Act,* but is expressly held by the United States Supreme Court to be legal and binding and within its powers.

Counsel refers to hypothetical cases where a railroad offers to secure steamer space below market rates, with the result that the shipper over its lines gets a rebate. The courts will deal properly with such cases *when they arise,* but they are not in point here. In *this* case there was no agreement to secure space *below the market rates,* but the fact is that the appellee went out and contracted for the space (in its own name) *at the market rate* and fully protected itself. There was not even the most indirect attempt to grant a rebate. We again repeat that appellee did not stand to lose *a single dollar* on the transaction, unless the party with whom it dealt was irresponsible.

Appellee cites in italics (Brief, p. 16) the *remarkable* holding of the Hamlen case that a guarantee of an ocean rate by a railroad is *ultra vires*—a holding *squarely opposed* to the two decisions of the United States Supreme Court before referred to. We shall not, however, further discuss this subject. No matter of *ultra vires* was either *pleaded* or *proved* in this case and it is elementary law that such a defense must be pleaded and proved in order to be available as a defense. Counsel recognize this in their discussion of the case of *St. Louis Ry. v. Birge-Forbes Co.,* 139 S. W. 3 (Brief, p. 20). As to their attempt to distinguish that case, we submit that it is wholly unsuccessful.

We submit in conclusion that the whole reason for this suit was the marked change in the freight

market *after* the contracts were made. Ordinarily this would not have prevented the carrying out of the contracts. Unfortunately, however, the late world catastrophe with its resultant violent shifting of values has in many cases strained to the breaking point the business morality of many whose reputation has been above reproach and, as a consequence, "contract cancellations" have been so numerous as to have brought universal reproach and disrepute upon much of the business world. Counsel for appellee say that "*for reasons undisclosed in the record,* this freight did not move from San Francisco when it arrived". Those reasons are, however, not far to seek and they plainly show *why* this case is now before the court.

Dated, San Francisco,
May 11, 1921.

Respectfully submitted,

E. B. McClanahan,
S. Hasket Derby,
H. W. Glensor,
Ernest Clewe,
Carroll Single,
Proctors for Appellant.

No. 3656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALDWIN SHIPPING COMPANY, INC.
(a corporation),

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING

E. B. McCLANAHAN,
S. HASKET DERBY,
Merchants' Exchange Building, San Francisco,
H. W. GLENSOR,
ERNEST CLEWE,
Mills Building, San Francisco,
CARROLL SINGLE,
Merchants' Exchange Building, San Francisco,
Proctors for Appellant and Petitioner.

No. 3656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALDWIN SHIPPING COMPANY, INC.
(a corporation),

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Baldwin Shipping Co., Inc., appellant herein, respectfully petitions your Honors for a rehearing of the above entitled cause upon the following grounds:

This Court has affirmed the decision of the District Court solely and exclusively upon the ground that the appellee acted as agent for appellant, and

not as principal, in the transactions in connection with which it is sought to be charged. The appellant is firmly convinced and respectfully submits that the Court's conclusion is based upon an incorrect interpretation of such facts as are referred to in its decision; upon a misapprehension as to the pleadings themselves; and upon a failure to give any consideration whatever to numerous vital and incontrovertible facts.

The decision indicates that the Court believed the libel to be based in the main upon a failure of the appellee *to reserve* steamer space. On the contrary each cause of libel in paragraph 3 thereof particularly specifies that the appellee

> "agreed with libelant to reserve steamer space for the transportation of, and *to transport or cause to be transported*"

certain commodities from San Francisco to Japan. The fourth paragraph of each cause of libel charges the appellee with the failure, not only to reserve steamer space, but *failure and refusal to transport* the commodities in question. Hence the pleadings themselves cannot be taken as any indication that the nature of the contract was one of agency rather than one of direct obligation.

The decision further indicates that the Court believes appellant's main contention to be that the appellee must be held an agent by reason of failure to disclose the name of the person with whom it had booked the freight in question. Primarily, however, the position of appellant is that the appellee

was a principal in fact, and secondarily, that by reason of its conduct, appellee estopped itself from any claim which it might otherwise have made of being an agent rather than a principal.

It may first be pointed out that appellee never suggested that it was an agent at any time or in any manner whatever throughout the transactions preceding the institution of the libel, even though on several occasions, as we will point out, it *was legally bound to declare its position.* Nor did it make such suggestion in the proceedings in this case until after the trial had begun. In its answer it did not so much as hint at, much less plead, any defense based upon a claim of agency. Hence the position taken by appellee in the midst of the trial and the suggestion of the District Court that appellee *might have been an agent,* came as an utter and complete surprise to appellant.

Indeed, had appellee considered itself an agent at any time prior to trial, it is entirely reasonable to suppose, not only that in the practice of ordinary caution it would have placed the fact in issue, but also that it would have followed the usual procedure of impleading Haley & Company, whom it now claims was the real party in interest. Its omission to do either of these things, coupled with the fact that the claim of agency was first made during the actual trial, tends to prove that this defense was made purely as an afterthought. It might well be urged that by reason of its failure to plead such

defense, the appellee was and should have been foreclosed of the right to present it at all.

Moreover, the main facts relied upon by this Honorable Court, in reaching its decision, are at most applicable only to *one* of the contracts sued upon, namely, that mentioned in the second cause of libel. We shall therefore take the liberty of referring to them by the numbers given them by the appellee itself, namely, No. 607, No. 608 and No. 613.

CONTRACT 607.

This contract was orally agreed upon. The first writing with respect to it consisted of a letter addressed by appellee to appellant under date of June 22, 1917, as follows:

> "Gentlemen:
>
> Referring to our phone conversation, we have booked for your account 750 tons of tin plate a month for September, October, November and December to Shanghai at $16.00 per ton, weight or measurement, ship's option.
>
> This will be covered by Sou. Pac. Contract #607.
>
> *Kindly confirm in writing.*"
>
> (Record, page 121, Libelant's Exhibit No. 1.)

In answer to appellee's request for written confirmation, the appellant dispatched the following letter on *June 26, 1917:*

> "Dear Sir:
>
> This will acknowledge receipt of your letter of June 22nd, File 1-E Contract #607, book-

ing for the account of the Baldwin Shipping Company 750 tons tinplate per month, September, October, November and December, 1917, at ocean rate of $16.00 per ton, weight or measurement, ship's option,—destined Shanghai and covered by your Contract No. 607.

You have advised us that at the present time you cannot inform us of the name of the line with which you have booked these 3,000 tons of tinplate, *but guarantee to clear on first-class steamers carrying lowest rate of insurance, and to protect the above rate,*—this is agreeable to us, however, at the earliest possible date let us know with whom you have booked this business so that we can give instructions to our New York office, relative to issuance of the bills of lading.

We will keep you advised of the forwarding of this business from the mills, and, if we can assist you in any way, do not fail to let us know."

(Record page 122, Libelant's Exhibit No. 2.)

CONTRACT 608.

This contract was also orally agreed upon and the first writing in connection with it was the following communication addressed by the appellee to the appellant under date of June 22, 1917:

"Gentlemen:

Confirming phone conversation:

We have booked for your account 2000 tons of pig iron and steel articles, inexcessive sizes, Japan late July, August, September, at $15.00 per ton, weight or measurement, ship's option.

This will be covered by Southern Pacific Contract #608.

Kindly confirm in writing."

(Record page 123, Libelant's Exhibit 3.)

In compliance with appellee's request for written confirmation, appellant on *June 26, 1917,* wrote as follows:

> "Dear Sir:
>
> This will acknowledge receipt of your letter of June 22nd, File 1-E, Contract 608, booking for the account of the Baldwin Shipping Company 2,000 tons pig iron and steel articles, in excessive sizes, Japan late July, August and September clearance at ocean rate of $15.00 per ton, weight or measurement, ship's option—covered by your contract 608.
>
> You have advised us that just at the present time you cannot divulge to us name of steamer line with whom you have booked these 2,000 tons steel articles, but that *you guarantee to protect $15.00 rate, and clear on first-class steamers carrying lowest rate of insurance,* however, as soon as you are able to advise us with whom you have booked this freight, please do so, in order that we may give instructions to our New York office relative to the issuance of the bills of lading.
>
> We will keep you advised of the forwarding of this business from the mills, and, if we can be of any further assistance to you, do not fail to let us know."
>
> (Record page 124, Libelant's Exhibit 4.)

CONTRACT 613.

After both contracts No. 607 and No. 608 had been completed and confirmed, on June 28, 1917, the witness Brown, representing appellee, after having had several conversations with the witness Green, representing appellant, advised the latter that a further booking had been made.

"Q. What did he say?

A. He said he had booked that 2,500 tons of iron and steel for us, and I asked him on what steamer and what company, and he told me that he could not tell me that, but that he guaranteed that it was an A-No. 1 steamship line, operating steamers carrying the highest rate of insurance.

Q. That is, the lowest premium? A. Yes.

Q. And the highest class of insurance.

A. I mean the highest class of insurance.

Q. Then what occurred with reference to these letters, if anything?

A. Then immediately, as soon as they would phone that (40) they had made a booking, I would confirm that telephone conversation.

Q. What did you do in this particular case?

A. That is what I did in this instance, confirmed it by letter.

Q. By the letter there? A. Yes.

Q. You mailed the original? A. Yes.

Q. When I said 'that letter', I mean this letter of June 28, 1917, addressed to Mr. Stubbs. (Libelant's Exhibit 6, Record page 127.) That is the one you sent? A. Yes.

Q. When did you receive this one here that is marked 'Libelant's Exhibit 3 for Identification'? (Libelant's Exhibit 5, Record page 126.)

A. Well, the next day, I believe."

(Record pages 41 and 42.)

The letter referred to by the witness as addressed to Mr. Stubbs was written *June 28, 1917,* and was as follows:

"Dear Sir:

This will confirm telephone conversation with your Mr. Brown, *booking firm* for the account of the Baldwin Shipping Company, 2,500 tons of steel articles, inexcessive sizes, destined Kobe-Yokohama, for clearance from San Francisco

August (25) to December, inclusive, 1917, at ocean rate of $15.00, weight or measurement, ship's option, covered by your contract No. 613.

You advise that you protect ocean rate of $15.00 per ton, and to clear on first-class steamers, carrying lowest rate of insurance, however, at the earliest possible date would thank you to advise steamer line with which you booked these 2500 tons, so that we can instruct our New York office relative to issuance of bills of lading.

Please acknowledge."

(Record page 127, Libelant's Exhibit 6.)

The second letter referred to by the witness as having been received *after the former* was sent was as follows:

"Messrs. G. R. Haley & Company,
149 California Street,
San Francisco, Calif.

Gentlemen:

Confirming phone conversation date:

Please book for the Southern Pacific 2,500 tons pig iron and steel articles for August and December clearance to Kobe and Yokohama at $15.00, weight or measurement, ship's option.

This will be covered by Southern Pacific contract 613.

I am attaching hereto an extra copy of this letter and would thank you to place acknowledgment thereon and return."

(Record page 126, Libelant's Exhibit 5.)

This letter does not even show that the booking was ever accepted by Haley, but it does show that appellant contracted with Haley & Co. as principal and not as agent for any one.

The communications from the appellee to the appellant of June 22, 1917, referring to contracts 607 and 608, are identical in every material respect. In each of them it is said, "We have booked for your account * * *". This phrase is one which had, and could have had, but one meaning, namely, that the writer of those letters had actually booked, that is to say, had *undertaken the transportation* of certain tonnage for the person to whom they were addressed. Each of the letters also contain the language, "This will be covered by *Sou. Pac. Contract #607* [608]." Certainly the only reasonable interpretation of this phrase is that the appellant had entered into *contracts* with the appellee *for ocean transportation.* Only by doing violence to the language used could it be said to mean anything else. The appellant respectfully submits that it was entitled to take it at its face value, and hence to conclude from it alone that it had a binding agreement with appellee for the performance of the contract of ocean carriage.

It will be observed that contract No. 613 was the only one as to which the appellee did not request confirmation. The reason for this is obvious. The terms of the agreement were specifically and correctly set forth in appellant's letter above quoted prior to the time that it received the copy of appellee's letter to Haley.

It will readily be seen from the foregoing that the appellee failed and refused, for reasons best known to itself, to acquaint the appellant with the

fact that the bookings under any of the contracts had been made with Haley & Company until *after all its agreements with the appellant had been completed* and were evidenced by writing. As a matter of fact the testimony shows without dispute, not only that contracts No. 607 and No. 608 had been completed before contract No. 613 was ever mentioned, but that appellant *never at any time* knew Haley in connection with either of them.

And yet this Court, after making reference to the Haley letter of June 28, says:

> "The appellant made no objection to the appellee's acting in so booking the freight, and we think the appellant was clearly chargeable with notice, that the same course was pursued by the appellee in booking the shipments which are the subject of the second and third causes of libel."

Appellant feels that your Honors wholly overlooked the fact that these contracts not only were wholly separate and distinct from and independent of contract No. 613, but antedated the latter by some days. Under these circumstances it certainly cannot be said that the appellant was charged with notice that the two preceding contracts, fully closed and confirmed before the name of Haley & Co. had ever been mentioned to it, had been made with that same concern, and in the same manner. There were many steamer lines, as well as brokers, engaged in ocean transportation.

The appellant certainly could have made no objection to appellee's course of conduct, with respect

to contracts 607 and 608, of which it never became aware until upon trial. It was then that appellee first revealed its further contracts with Haley & Co., the dates of which are still unknown to appellant.

Still more unjust does it appear to charge appellant with such notice, when the record shows that in spite of repeated demands made by it, throughout several months, for information as to the identity of the company with which the appellee had contracted, the very agent of the appellee, Mr. Boyson, who made the bookings, failed to disclose the fact.

> "Q. Now, are you still willing and ready to swear that you notified the Baldwin Shipping Co. that you booked these contracts with C. R. Haley & Co.
>
> A. According to these two contracts that I made there, I did not notify them that I made the contracts with C. R. Haley."
>
> (Record page 99.)

A fact not adverted to in the opinion, which appellant believes of the utmost importance in establishing the relation between appellant and appellee, is the following:

The appellee requested a written confirmation by appellant of contracts Nos. 607 and 608. Such a request is commonly made *when an agreement has been orally entered into, and the parties desire that written evidence thereof be had.*

In each of the letters of confirmation it is expressly stated:

1. What rate and tonnages are agreed upon.

2. That the appellee guarantees to protect the quoted rate.

3. That the appellee had guaranteed clearance on first-class steamers carrying the lowest rate of insurance.

Certainly the appellee was legally and morally bound, upon receipt of these confirmatory communications, sent at its own request, either to deny that its agreement was as therein stated, or by remaining silent to acknowledge the correctness thereof, to accept the same, and to agree to be bound thereby. The fact is, however, that at no time, either upon receipt of the confirmatory letters, or thereafter, during the extended communications between the parties, did appellee give the slightest indication that the terms of the oral agreement were in any manner or in any degree incorrectly stated in these letters. It permitted appellant to rest its understanding of the agreement, stated at appellee's request, and now attempts to set that understanding at naught. This, it is submitted, is most signally against law and good conscience.

As we have pointed out, *the only document* purporting to set forth the terms of the contract No. 613 was the appellant's letter of June 28, 1917, above set forth. To this letter appellee made no response of any kind or character. It must therefore be held in law to have assented to the terms therein stated, for it is a firmly established rule

that where one party to an agreement states his understanding of the terms thereof to the other, at the time the agreement is reached, the latter must either disavow them or by silence be held to have consented thereto. The terms of that agreement, definitely stated and never refuted, cannot be set at naught by any mere inference to be drawn from the later receipt by appellant of a copy of appellee's letter to the Haley Company.

Not only is there nothing in the subsequent correspondence between the parties at variance with the statement of the oral agreement as set forth in these confirmatory letters, but it all shows that the appellant, *to the full knowledge of appellee,* always considered and dealt with appellee as a principal, and not as an agent. Thus, in the letter of November 2, 1917 (Record page 129), the appellant insisted "on the clearance of this business without delay" (on contract 608). No reply was made by appellee.

In December, 1917, appellant wrote the appellee a letter in connection with each of the contracts, from which it clearly appears, and from which it must have been apparent to the appellee, that appellant looked to it for the ocean carriage of the freight. In each of those letters it stated:

> "We have not yet been advised by you that any of this tin plate (pig iron and steel) has been cleared from this coast, and desire to hear from you fully on this subject by return mail.
>
> We shall be very glad to do everything in our power *to aid you in moving this freight.*

Please give the matter your immediate attention and let us have your acknowledgment of the receipt of this communication."

(Record pages 134, 135, 136.)

But no reply was made to any of these letters, wherein the attention of the appellee was drawn to *its duty to transport* the freight, and yet it is now permitted to say that it had not undertaken this obligation, but was merely acting the part of an agent.

Again in December, 1917, in connection with contract No. 608, the appellant again directed the attention of the appellee to its obligation in the following letter:

"Gentlemen:

Attention Mr. J. C. Stubbs, G. F. A.
Your file No. 1-E, Contract 608.

We beg to refer you to your letter of June 22nd, 1917, in which you confirmed your earlier telephonic advice to the effect that you had booked for movement to Japan 2000 tons of pig iron and steel articles, inexcessive sizes, during late July and the months of August and September of this year. This booking was made by you to complete through shipments of iron and steel which were initiated by you on our account from eastern points of origin to points of destination in Japan.

Your files will disclose the fact that such shipments were undertaken by you at eastern points of origin and that *we have frequently called upon you to complete the movement thereof to Japan.* This you have failed to do and iron and steel which under your agreement with us should have been cleared from this coast on or prior to the end of September of this year, is still in this port.

Subsequently to the 30th day of September, 1917, *we made further demand upon you for the completion of the shipments,* but without avail.

We must and we do hold you responsible for and *look to you for the completion of your contract.* In view, however, of the previous course of events and the present situation, we find ourselves under the necessity of securing the movement of the tonnage to Japan, the shipment of which you have undertaken, but which up to this time has proceeded no further than to this port, as best we may.

You are advised, therefore, that we shall endeavor to secure the necessary cargo space for this purpose in the open market upon the best terms available. We shall wish to minimize damages, maybe, and to that end will, whenever we can conveniently do so, inform you of contemplated bookings so as to give you an opportunity to obtain better terms if you desire to do so.

You are further advised that we shall hold you responsible for damage which we have already suffered or which we may hereafter suffer by reason of your nonperformance of your contract."

(Record page 136, Libelant's Exhibit No. 2.)

Nothing, it seems, could more clearly demonstrate the fact, than does this letter, that the appellant considered the appellee as the principal. It is true it was written after the time for performance had arrived. But it was also written before damages had fully accrued, and at a time the appellant still left it open for appellee to perform. Moreover, it was in precise accord with all the previous correspondence, and *no exception was ever taken to it.*

It is obvious, therefore, that not a single written communication passed between the parties to this action which does not show.

1st. That the appellant looked upon appellee as a principal.

2nd. That appellant placed its version of its relationship with appellee upon record at appellee's request.

3rd. That appellee at no time before the trial made any suggestion that appellant's view of the relationship was incorrect.

4th. That only by doing violence to the plain meaning of language, and by resting upon mere inference, as against positive evidence, could it be concluded that appellee was agent rather than principal.

It further appears that all of appellee's contracts with Haley & Company were made in its *own name* and not in that of appellant. This would not have been the case had the appellee been a mere agent, for, by its contracts, it bound itself to Haley & Co., as principal, liable to the latter for the payment of the full amount of freight, namely, $69,000.00. Would not the dictates of the most ordinary prudence have led it to disclose to Haley & Company that it was agent and not itself responsible as principal for this very large sum of money?

Certainly no privity of contract was created between Haley & Co. and appellant. Had the shipments been made as agreed, the appellant would

have been liable to pay the freight moneys to appellees and not to Haley & Co., whose name had never been mentioned until all three contracts were completed, and then only in connection with the one last entered into.

It seems also to have escaped the attention of the Court that the appellee customarily performed a duty absolutely inconsistent with the theory that it was agent merely *to secure space.* Upon arrival in San Francisco of freight booked with it, as in this case, appellee itself delivered it to the vessel for transportation, and attended to the details of its clearance and shipment.

> "Q. The idea back of the booking of this space was to get this stuff to move over your railroad to San Francisco, was it not?
>
> A. Generally speaking, yes.
>
> Q. And you delivered it right to the steamship under these bookings and put it aboard the steamer, that is, you delivered it to the docks, didn't you?
>
> A. That was handled by the local officers, with which I was not familiar.
>
> Q. You know as a fact, don't you, without knowing the details of how it was done, that the Southern Pacific cleared this freight under these bookings to the steamer?
>
> A. Unless the shipper took it out of the hands of the Southern Pacific by arbitrarily diverting it to other steamer lines.
>
> Q. Unless he did that, the Southern Pacific cleared under the bookings under which it arrived here? A. Yes."
>
> (Record page 94.)

J. G. Stubbs, General Freight Agent, testified as follows on this point:

> "Q. Now, the matter of handling freight traffic that originated at points either in or east of your territory, that cleared and was delivered to ships through this port, was handled over that [foreign] desk, was it not?
>
> A. They handled the detail of that work, yes."
>
> (Record pages 54 and 55.)

He further testified in connection with his recollection of contracts Nos. 607 and 608:

> "That recollection, if I may say, comes about in this way, that in the congestion of export freight in the latter part of 1917, I had, *so far as the Southern Pacific Company was concerned,* the task of clearing up that congestion, trying to get rid of it from the port, and I had made up a list *of the export freight that we had on hand,* and why it was not cleared; and I recall in that list contract 607 and 608 on account of the Baldwin Shipping Company. That is the reason those numbers (56) have stuck in my mind."
>
> (Record page 58.)

It also appears that the appellant at no time knew or inquired whether the appellee profited through the booking made by it.

(Record page 105.)

In addition the record shows that at least one other railroad, the Western Pacific Company, itself chartered a vessel in order to perform similar booking contracts made by it.

"Q. Mr. Ragland, is it not a fact that some of the other railroad carriers chartered ships to clear commodities that were brought in here by rail? * * *

A. Yes, it is a fact that the Western Pacific Company chartered a steamer to protect their contracts."

(Record page 106.)

The appellant respectfully insists, therefore, that the entire course of conduct of the parties is absolutely inconsistent with the existence of the relationship of principal and agent, and shows conclusively that they were simple contractors.

But, entirely aside from this point, appellant contends that appellee is wholly estopped, at least so far as contracts 607 and 608 are concerned, from claiming that it acted as agent, for the reason that as to both of them it undeniably violated the first duty of an agent to acquaint his principal with the most material fact of a contract purporting to have been made on his behalf. Mr. Boyson, who made the bookings with Haley & Company covering these two contracts, admits that he did not notify appellant of his action. As was pointed out in appellant's reply brief, the record is replete with uncontradicted evidence, both documentary and oral, that appellant, throughout a period of months, frequently demanded the information which was never given it, until after action was begun. *At no time* was appellant told that Haley & Co. had anything whatever to do with contracts 607 and 608. Nor, as has been pointed out, could the copy of the letter to

Haley, received by appellant days after contracts 607 and 608 had been fully stated and completed, affect the rights of appellant thereunder.

The appellant most respectfully submits, in conclusion, that the record in this case shows that all the transactions, oral and written, between the parties are wholly consistent with but one theory, namely, that the appellee undertook a primary obligation to appellant to transport, or cause to be transported, the freight in question; that appellant, at the specific request of appellee, made a written statement of the oral agreements to which appellee never took the slightest exception, and to which, therefore, it must be held to have assented; that, under the contracts so stated the appellee is liable for the ocean transportation, and that to permit it to escape liability, under a claim of agency never made prior to trial, would be to visit upon appellant an injury for which appellee is solely and exclusively responsible. For by its silence when legally bound to speak, if for no other reason, it permitted itself to be made a principal.

Dated, San Francisco,
August 31, 1921.

Respectfully submitted,

E. B. McClanahan,
S. Hasket Derby,
H. W. Glensor,
Ernest Clewe,
Carroll Single,
Proctors for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 31, 1921.

ERNEST CLEWE,
Of Counsel for Appellant and Petitioner.

No. 3659

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

TRANSCRIPT OF RECORD

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA.

No.....

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

TRANSCRIPT OF RECORD

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA.

INDEX

Names and Addresses of Attorneys of Record:

Messrs. McINTIRE & MURPHY, of Helena, Montana,

Attorneys for Plaintiff in Error.

Messrs. BELDEN & DeKALB, of Lewistown, Montana,

Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Defendant in Error.

In the District Court of the United States, District of Montana, Helena Division.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant

COMPLAINT

I.

The plaintiff, who is and at all the times hereinafter mentioned was a citizen of the United States and of the State of California, complains of the defendant, who at all of said times was and is a citizen of the United States and of the State of Montana, and alleges that the above entitled cause is a suit of a civil nature wherein the matter or amount in controversy or dispute exceeds, exclusive of interest and costs, the sum

or value of three thousand dollars ($3,000.00); and the said plaintiff further complains and alleges:

II.

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo.

be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"Signed and sealed:

Mary M. Smith
Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further

sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six hundred dollars ($600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1911, and for costs of suit.

II.

And for a further and second cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a

copy of which deed is hereto attached marked Exhibit " A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.
>
> "Signed and sealed:
>
> Mary M. Smith
>
> Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and

allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six hundred dollars ($600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1912, and for costs of suit.

III.

And for a further and third cause of action against

the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good

until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"Signed and sealed:

Mary M. Smith

Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty ($50.00) dollars a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often

thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six hundred dollars ($600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1913, and for costs of suit.

IV.

And for a further and fourth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block letter "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Ex-

hibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.
> "Signed and sealed:
>
> Mary M. Smith
> Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than

the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred dollars ($600.00) together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1914, and for costs of suit.

V.

And for a further and fifth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M.

Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the

first part, Mary Smith, if alive, if not to her heirs. "Signed and sealed:

Mary M. Smith
Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to com-

ply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred dollars ($600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1915, and for costs of suit.

VI.

And for a further and sixth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for

the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.
>
> "Signed and sealed:
>
> Mary M. Smith
> Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred dollars ($600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1916, and for costs of suit.

VII.

And for a further and seventh cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned

the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"Signed and sealed:

Mary M. Smith
Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff

the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred Dollars ($600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1917, and for costs of suit.

VIII.

And for a further and eighth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and ~~is~~ is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature

and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.
>
> "Signed and sealed:
>
> Mary M. Smith
> Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that there-

upon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred Dollars ($600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1918, and for costs of suit.

IX.

And for a further and ninth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated

in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed a certain agreement and contract in writing, which is in the words and figures following, to-wit:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.
>
> "Signed and sealed:
>
> Mary M. Smith
> Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand

and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Six Hundred Dollars ($600.00), together with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1919, and for costs of suit.

X.

And for a further and tenth cause of action against the defendant the plaintiff complains and alleges:

1. That she, plaintiff, is the sister of Mary M. Smith; that at the several times hereinafter mentioned the said Mary M. Smith was and is now the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated and described as Lots numbered three (3) and four (4) in Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings and structures thereon situated known as the Hoffman House.

2. That on, to-wit, the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises, by deed, to the defendant, Sadie Hoffman, a copy of which deed is hereto attached marked Exhibit "A," and of this complaint made a part, and that contemporaneously with the said deed and conveyance and as a part of the same transaction, and for the purpose of showing and evidencing the nature and intent with which said deed and conveyance was executed, the said Mary M. Smith and the said Sadie Hoffman, the defendant herein, made and executed

a certain agreement and contract in writing, which is in the words and figures following, to-wit.

"A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs.

"Signed and sealed:

Mary M. Smith
Sadie Hoffman."

and the plaintiff does allege that the deed therein referred to does and was intended to refer to the deed, Exhibit "A" hereof, and the "Hoffman House" therein referred to does and was intended to refer to the premises set out and described in subdivision 1 of this cause of action, and the name therein contained, to-wit, Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract.

3. Plaintiff does further aver and allege that thereupon said papers, respectively, were delivered and the defendant in pursuance thereof entered into the possession and enjoyment of said premises, and since

then has continued and is now in such enjoyment and possession.

4. That defendant, in pursuance of the aforesaid transaction, paid to the plaintiff the sum of Fifty Dollars ($50.00) a month down to, to-wit, the 14th day of October, 1910, but since then she has wholly failed, neglected and refused to pay the plaintiff any further sums of money whatsoever, although often thereunto requested.

5. That prior to the commencement of this action a demand was made upon the said defendant to comply with her said agreement and to pay to the plaintiff the sums of money coming and due to her by reason of said contract and agreement, but defendant has refused and neglected to comply with said demand and does continue such refusal and neglect.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Fifty Dollars ($50.00) a month for each and every month from and after the 14th day of October, 1919.

WHEREFORE, plaintiff prays judgment against the defendant: (1) For the sum of Six hundred dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1911;

2. For the sum of Six Hundred dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1912;

3. For the sum of Six Hundred dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1913;

4. For the sum of Six Hundred Dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1914;

5. For the sum of Six Hundred Dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1915;

6. For the sum of Six Hundred Dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1916;

7. For the sum of Six Hundred Dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1917;

8. For the sum of Six Hundred Dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1918;

9. For the sum of Six Hundred Dollars ($600.00) with interest thereon at the rate of eight per cent per annum from the 14th day of October, 1919;

10. For the sum of Fifty Dollars ($50.00) a month for each and every month after October 14, 1919;

And for costs of suit.

McINTIRE & MURPHY,
Plaintiff's Attorneys.

State of Montana,
County of Lewis and Clark,—ss.

HOMER G. MURPHY, being first duly sworn, deposes and says. That he is one of the attorneys for the plaintiff named in the foregoing complaint and as such makes this verification for and on behalf of the said plaintiff for the reason that said plaintiff is not

now within the County of Lewis and Clark, which is the County wherein affiant resides; that he has read the foregoing complaint and knows the contents thereof and that the matters and things therein alleged are true to the best of his knowledge, information and belief.

Homer G. Murphy.

Subscribed and sworn to before me this 25th day of June, 1920.

Clara E. Bower.

Seal

NOTARY PUBLIC for the State of Montana. Residing at Helena, Mt. My commission expires

EXHIBIT "A."

THIS INDENTURE, made the 16th day of February, in the year of our Lord one thousand nine hundred and ten (1910) between Mary M. Smith, a widow in her own right of property, of Pasadena, California, and Smith Brothers Sheep Co. of Martinsdale, Montana, Mary M. Smith, proprietor and owner, the parties of the first part, and Sadie Hoffman, of Lewistown, Fergus County, Montana, the party of the second part.

WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar and other valuable considerations, lawful money of the United States of America to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to her heirs and assigns forever, all the real property situated in Fergus County, State of Montana, described as follows: Lots numbered three (3) and four (4) in Block lettered "O"

in number seventeen of the original Townsite of Lewistown, Fergus County, Montana, as is shown by a plat thereof on file and of record in the office of the county clerk and recorder of Fergus County, Montana.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder or remainders, rents, issues and profits thereof, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part or parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, and to her heirs and assigns forever. And the said party of the first part, and heirs does hereby covenant that she will forever warrant and defend all right, title and interest in and to the said premises, and the quiet and peaceable possession thereof, unto the said party of the second part, and all and every person and persons whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said party of the first part, has hereunto set her hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of:

SMITH BROS. SHEEP CO. (SEAL)
MARY M. SMITH (SEAL)

By Mary M. Smith, Proprietor and Owner.

State of California,
County of Los Angeles,—ss.

On this fourteenth day of March, in the year one thousand nine hundred and ten, before me, H. I. Chatfield, a Notary Public in and for the county and state aforesaid, personally appeared Mary M. Smith, a widow, in her own right of property, of Pasadena, California, and Mary M. Smith, proprietor and owner of Smith Brothers Sheep Co., of Martinsdale, Montana, the party of the first part, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

(SEAL) H. I. CHATFIELD.

Notary Public in and for Los Angeles County, State of California.

Endorsed: "Filed for record this 21st day of March, A. D. 1910, at 9:50 o'clock a. m. in book 35, page 429, deed records of Fergus County, Montana.

C. L. MYERSICK, Register of Deeds.

By G. M. DEATON, Deputy."

Filed: June 25, 1920.

C. R. Garlow, Clerk.

Thereafter on June 25, 1920, summons was duly issued in said cause out of said court in words and figures following, to-wit:

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting:

TO THE ABOVE NAMED DEFENDANT.....
Sadie Hoffman.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS: the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court, District of Montana, this 25th day of June, in the year of our Lord one thousand nine hundred and

twenty, and of our Independence the 144.

(Court Seal) C. R. GARLOW,
Clerk.
H. H. WALKER,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE,
District of Montana,

I HEREBY CERTIFY, that I received the within summons on the 26th day of June, 1920, and personally served the same on the 26th day of June, 1920, on defendant, Sadie Hoffman, by delivery to, and leaving with said defendant named therein personally, at Lewistown, County of Fergus, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by clerk of said court attached thereto.

Dated this 28th day of June, 1920.

JOS. L. ASHBRIDGE,
U. S. Marshal.
By J. W. RICKMAN,
Deputy.

Filed, June 30, 1920.
C. R. GARLOW, Clerk.

Thereafter, on July 16, 1920, demurrer of defendant ~~in error~~ was filed herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

DEMURRER

I.

Comes now the defendant in the above entitled action and demurs to the complaint on file therein, upon the following ground:

1. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

And demurs to each and every alleged separate cause of action set out in said complaint, upon the ground:

1. That the same does not state facts sufficient to constitute a cause of action against this defendant.

Dated this 15th day of July, 1920.

BELDEN & DeKALB
GUNN, RASCH & HALL,
Attorneys for Defendant.

Due service of within demurrer and receipt of a copy thereof acknowledged this 16th day of July,

1920.

McINTIRE & MURPHY,
Attorneys for Plaintiff.

Filed: July 16, 1920.
C. R. Garlow, Clerk.

Thereafter said demurrer came on to be heard before said court, and the following order was made and entered herein:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

No. 842. Ollie N. McNaught vs. Sadie Hoffman.

On motion of E. N. Hall, Esq., counsel for defendant, and by consent of Homer G. Murphy, Esq., counsel for plaintiff, court ordered that the demurrer may be withdrawn and defendant granted thirty days to answer.

Entered in open court July 24, 1920.
C. R. Garlow, Clerk.

Thereafter on August 16, 1920, Sadie Hoffman filed her answer herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA, HELENA DIVISION.

OLLIE N. McNAUGHT,
Plaintiff,

vs.

SADIE HOFFMAN,
Defendant.

ANSWER.

COMES NOW THE DEFENDANT, and for an-

swer to plaintiff's *first* cause of action in plaintiff's complaint on file herein, states and alleges:

I.

ADMITS the affirmative allegations of the first division of plaintiff's complaint.

II.

Defendant admits that plaintiff is a sister of Mary M. Smith, but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the Original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

III.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract

in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *first cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

IV.

Denies that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's first cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's first cause of action herein:

in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *first cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

IV.

Denies that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's first cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's first cause of action herein:

"Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel that you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,

Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's first cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

V.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's first cause of action.

VI.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *first* cause of ac-

tion herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE to plaintiff's *first* cause of action herein, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *first* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's first cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S SECOND CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise

or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2 division II of plaintiff's ocmplaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed, Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *second cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execu-

tion and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's second cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary

M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's second cause of action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so we need make no other deed. Sincerely,
>
> Mary M. Smith."

That in accordance with the purpose and intent of the said writing set forth in subdivision II of plaintiff's second cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's second cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *second* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *second* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit:

on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's second cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S THIRD CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part

of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2 of division II of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's third cause of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers or any of said papers except the said deed, were delivered; and denies that the defend-

ant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's third cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that

understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's third cause of action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
>
> Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's third cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every

allegation, matter and thing contained in subdivision V of plaintiff's third cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *third* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S THIRD CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S THIRD CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *third* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant

to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's third cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S FOURTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as Lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's com-

plaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *fourth cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or con-

tract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's fourth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to

make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's fourth cause of action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
>
> Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's fourth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to

her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's fourth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *fourth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S FOURTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S FOURTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing

set forth in paragraph II of said *fourth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's fourth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S FIFTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all, except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon

situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *fifth cause* of action; and

admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's fifth cause of action, was executed by the

said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's fifth cause of action herein:

> "Dear Sadie: . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
>
> Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's fifth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made

the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's fifth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *fifth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S FIFTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S FIFTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *fifth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's fifth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S SIXTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewis-

town, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the bulidings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and coneyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II, of plaintiff's complaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not and is not any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred

to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *sixth cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in purusance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

Denies that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in fur-

therance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's sixth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and proivde for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's sixth cause of action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
>
> Mary M. Smith."

That in accordance with the purpose and intent of the said writing set forth in subdivision II of plain-

tiff's sixth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's sixth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *sixth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S SIXTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years:

an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S SIXTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said sixth cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's sixth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S SEVENTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the

and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's seventh cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's seventh cause of action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel that you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
>
> Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's seventh cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiffs' seventh cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *seventh* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S SEVENTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

"The periods prescribed for the commence-

ment of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE to plaintiff's *seventh* cause of action herein, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *seventh* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's seventh cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S EIGHTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plain-

tiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2 division II of plaintiff's ocmplaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any considera-

tion whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed, Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision 1 of plaintiff's *eighth cause* of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any fur-

ther sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's eighth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's eighth cause of action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old),

so we need make no other deed. Sincerely,

Mary M. Smith."

That in accordance with the purpose and intent of the said writing set forth in subdivision II of plaintiff's eighth cause of action, the said notice of October 9th,, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's eighth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *eighth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S EIGHTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Mon-

tana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S EIGHTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *eighth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's eighth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S NINTH CAUSE OF ACTION, DEFENDANT states and alleges:

Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's ninth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's ninth cause of action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to

Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,

Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's ninth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's ninth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *ninth* cause of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S NINTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S NINTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *ninth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910, the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's ~~third~~ ninth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

FOR ANSWER TO PLAINTIFF'S TENTH CAUSE OF ACTION, DEFENDANT states and alleges:

I.

Defendant admits that plaintiff is a sister of Mary M. Smith; but denies that at the several times in plaintiff's complaint mentioned, or at any other time or at all except as hereinafter specifically set forth, the said Mary M. Smith was the owner of those certain lots, pieces or parcels of land situated in the City of Lewistown, County of Fergus, State of Montana, designated or described as Lots numbered Three (3) and Four (4), Block lettered "O" in Seventeen (17) of the original Townsite of Lewistown, Fergus County, Montana, together with the buildings or structures thereon situated, known as the Hoffman House.

II.

ADMITS that on, to-wit: the 14th day of March, 1910, the said Mary M. Smith conveyed said land and premises by deed to the defendant, Sadie Hoffman, a copy of which deed is attached to plaintiff's complaint, marked Exhibit "A"; but denies that contemporaneously with the said deed or conveyance, or as a part of the same transaction or for the purpose of showing or evidencing the nature and intent with which said deed and conveyance was executed, or otherwise or at all except as hereinafter set forth, the said Mary M. Smith, or the said Sadie Hoffman, the defendant herein, made or executed a certain agreement or contract in writing in the form or language set forth in paragraph 2, division II, of plaintiff's com-

plaint; but alleges the truth and fact to be that the said memorandum was entered into after the making, execution and delivery of the said deed, and the making and signing of the said writing set forth in said paragraph 2 was not made a condition precedent to the delivery of the said deed, and was not, and is not, any consideration whatsoever therefor; but the said writing was entered into at the request of the said Mary M. Smith without any consideration whatsoever therefor. Defendant admits that the deed in said writing referred to, was intended to refer to the deed Exhibit "A" to plaintiff's complaint, and the Hoffman House therein referred to was intended to refer to the premises set out and described in subdivision I of plaintiff's *tenth* cause of action; and admits that the name therein contained, to-wit: Mrs. J. A. McNaught, does and was intended to refer to the plaintiff herein; but denies that no other or further consideration for the said deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract. Defendant denies that thereupon said papers, or any of said papers except the said deed, were delivered; and denies that the defendant in pursuance thereof, or except in pursuance of the said deed, entered into the possession or enjoyment of the said premises; but admits that since the execution and delivery of the said deed the defendant has continued, and is now in the enjoyment of the possession of the said premises.

III.

DENIES that the defendant, in pursuance of the aforesaid transaction, or otherwise or at all except in furtherance of the request of the said Mary M. Smith, paid to the plaintiff the sum of Fifty ($50.00) Dollars a month down to, to-wit: the 14th day of October, 1910; but admits that defendant has since the said time, wholly failed to pay the plaintiff any further sums of money whatsoever, and denies that she has often, or otherwise or at all been requested so to do; and defendant further alleges that no moneys whatsoever were paid to plaintiff in pursuance of, or in furtherance of any such contract, as is specified and set forth in plaintiff's complaint herein; but that the said paper writing set forth in subdivision II of plaintiff's tenth cause of action, was executed by the said Mary M. Smith and the said Sadie Hoffman with the distinct understanding that the terms and phrase "unlimited time thereon" was to be taken and understood by the said Mary M. Smith and the said Sadie Hoffman to mean and be construed as such time as might be necessary for the said Mary M. Smith to make arrangements from some other source to care for and provide for the said plaintiff; and the same was executed and delivered with that interpretation and that understanding being placed upon the said instrument and had by the said parties thereto; and that on or about the 9th day of October, 1910, the said Mary M. Smith notified and informed the defendant of and concerning the said writing so set forth in subdivision II of plaintiff's tenth cause of

action herein:

> "Dear Sadie: . . . Now a little business, dear. We signed a contract while you were in Calif. When I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it, not (too old), so you need make no other deed. Sincerely,
>
> Mary M. Smith."

That in accordance with the purpose and intent of the said writing, set forth in subdivision II of plaintiff's tenth cause of action, the said notice of October 9th, 1910, was intended to and did relieve this defendant of and from any other or further obligation under and by virtue of the said memorandum made the basis of this action.

IV.

ADMITS that prior to the commencement of this action a demand was made upon defendant to pay the plaintiff the sums of money claimed to be due to her by reason of the said alleged contract and agreement, and admits that defendant has refused and neglected to comply with the said demand and does continue such refusal and neglect; but denies each and every allegation, matter and thing contained in subdivision V of plaintiff's tenth cause of action.

V.

DENIES each and every allegation, matter and thing set forth and contained in plaintiff's *tenth* cause

of action herein, not hereby specifically admitted, qualified or denied.

FOR A SEPARATE, SECOND AND FURTHER DEFENSE TO PLAINTIFF'S TENTH CAUSE OF ACTION HEREIN, defendant states and alleges:

I.

That the said alleged cause of action of plaintiff is barred under and by virtue of the provisions of Sections 6443-6445 of the Revised Codes of Montana, which read as follows:

> "The periods prescribed for the commencement of action other than for the recovery of real property are as follows: . . . within 8 years: an action upon any contract, obligation or liability founded upon an instrument in writing."

FOR A SEPARATE, THIRD AND FURTHER DEFENSE TO PLAINTIFF'S TENTH CAUSE OF ACTION HEREIN, the defendant states and alleges:

I.

That on the date of the execution of the said writing set forth in paragraph II of said *tenth* cause of action, the said Mary M. Smith was not indebted to or under any obligation whatsoever to the said plaintiff therein named as Mrs. J. A. McNaught, and there was no consideration whatsoever passed from the said plaintiff to the said Mary M. Smith or to this defendant to support the said instrument; and that after the execution and delivery of the said instrument, to-wit: on or about the 14th day of October, 1910,

the same was by the defendant and the said Mary M. Smith, rescinded and annulled and held for naught.

WHEREFORE, defendant prays judgment:

1. That plaintiff's tenth cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

WHEREFORE, defendant prays judgment:

1. That plaintiff's first cause of action be dismissed.

2. For her costs and disbursements herein expended and incurred.

3. That plaintiff's second cause of action be dismissed.

4. For her costs and disbursements herein expended and incurred.

5. That plaintiff's third cause of action be dismissed.

6. For her costs and disbursements herein expended and incurred.

7. That plaintiff's fourth cause of action be dismissed.

8. For her costs and disbursements herein expended and incurred.

9. That plaintiff's fifth cause of action be dismissed.

10. For her costs and disbursements herein expended and incurred.

11. That plaintiff's sixth cause of action be dismissed.

12. For her costs and disbursements herein expended and incurred.

13. That plaintiff's seventh cause of action be dismissed.

14. For her costs and disbursements herein expended and incurred.

15. That plaintiff's eighth cause of action be dismissed.

16. For her costs and disbursements herein expended and incurred.

17. That plaintiff's ninth cause of action be dismissed.

18. For her costs and disbursements herein expended and incurred.

19. That plaintiff's tenth cause of action be dismissed.

20. For her costs and disbursements herein expended and incurred.

GUNN, RASCH & HALL,
BELDEN & DEKALB,
Attorneys for Defendant.

State of Montana,
County of Fergus,—ss.

O. W. BELDEN, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant named in the foregoing answer and as such makes this verification for and on behalf of the said defendant, for the reason that said defendant is not now within the County of Fergus, which is the County wherein affiant resides; that he has read the foregoing answer and knows the contents thereof; and that the

matters and things therein alleged are true to the best of his knowledge, information and belief.

O. W. BELDEN.

SUBSCRIBED AND SWORN TO, before me, this 14th day of August, 1920.

ELMIE KROHNKE.
Notary Public for the State of Montana, residing at Lewistown, Montana.

(NOTARIAL SEAL) My commission expires May 25, 1923.

Filed: Aug. 16th, 1920. C. R. Garlow, Clerk.

Thereafter on August 26, 1920, plaintiff served and filed her demurrer to certain parts of said answer, which demurrer is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA, HELENA DIVISION.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

DEMURRER.

The plaintiff demurs to the parts and portions of the answer herein which are hereinafter specifically designated for the reason and on the ground that the same do not state facts sufficient to constitute a defense or counter-claim to plaintiff's causes of action set forth in the complaint herein, or to any of said

causes of action, and that the same are, and each of them is, insufficient in law on the face thereof, to-wit:

I.

All that portion of said answer designated as II on page 1 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as III on pages 1-2 of said answer beginning with the word "but" in line 32 of said page 1 down and including the word "therefor" in line 14 on page 2 of said answer; also the portion of said subdivision III of said answer beginning with the word "but denies" in line 22 on page 2 down to and including the word "premises" in line 29 on page 2 of said answer.

III.

All of that portion of said answer designated as IV on page 3 thereof, save the admission therein contined, in lines 5-7 on page 3 of non-payment since October, 14, 1910.

IV.

All of that portion of said answer designated as VI on page 4 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's First cause of action" on page 4 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's first cause of action" on page 4 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's second cause of action herein, beginning on page 5 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 5 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on pages 5-6 of said answer beginning with the word "but" in line 2 of said page 6 down and including the word "therefor" in line 16 on page 6 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 23 on page 6 down to and including the word "premises" in line 31 on page 6 of said answer.

III.

All of that portion of said answer designated as III on page 7 thereof, save the admission therein contained, in lines 8-10 on page 7 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 8 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's second cause of action" on page 8 of said answer.

VI.

All that portion of said answer designated: "A

separate, third and further defense to plaintiff's second cause of action" on page 9 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's third cause of action herein beginning on page 9 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 9 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 10 of said answer beginning with the word "but" in line 5 of said page 10 down and including the word "therefor" in line 19 on page 10 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 28 on page 10 down to and including the word "premises" in line 3 on page 11 of said answer.

III.

All of that portion of said answer designated as III on page 11 theerof, save the admission therein contained, in lines 11-13 on page 11 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 12 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's third cause of action" on page 12 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's third cause of action" on page 13 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's fourth cause of action herein beginning on page 13 of said answer for the reasons hereinbefore stated, to-wit:

I.

All of that portion of said answer designated as I on page 13 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 14 of said answer, beginning with the word "but" in line 4 of said page 14 down and including the word "therefor" in line 18 on page 14 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 26 on page 14 down to and including the word "premises" in line 1 on page 15 of said answer.

III.

All of that portion of said answer designated as III on page 15 thereof, save the admission therein contained, in lines 10-12 on page 15 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 16 thereof.

V.

All of that portion of said answer designated: "A

separate, second and further defense to plaintiff's fourth cause of action" on page 16 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's fourth cause of action" on page 16 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's fifth cause of action herein beginning on page 17 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 17 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 18 of said answer beginning with the word "but" in line 7 of said page 18 down and including the word "therefor" in line 20 on page 18 of said answer; also the portion of said subdivision II of said answer, beginning with the words "but denies" in line 29 on page 18 down to and including the word "premises" in line 4 on page 19 of said answer.

III.

All of that portion of said answer designated as III on page 19 thereof, save the admission therein contained, in lines 12-14 on page 19 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 20 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's fifth cause of action" on page 20 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's fifth cause of action" on page 21 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's sixth cause of action herein beginning on page 21 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 21 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 22 of said answer beginning with the word "but" in line 8 of said page 22 down and including the word "therefor" in line 21 on page 22 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 22 down to and including the word "premises" in line 5 on page 23 of said answer.

III.

All of that portion of said answer designated as III on page 23 thereof, save the admission therein contained, in lines 12-15 on page 23 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 24 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's sixth cause of action" on page 24 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's sixth cause of action" on page 25 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's seventh cause of action herein beginning on page 25 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 25 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 26 of said answer beginning with the word "but" in line 9 of said page 26 down and including the word "therefor" in line 21 on page 26 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 26 down to and including the word "premises" in line 5 on page 27 of said answer.

III.

All of that portion of said answer designated as III on page 27 thereof, save the admission therein con-

tained, in lines 13-15 on page 27 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 28 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's seventh cause of action" on page 28 thereof. of said answer

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's eighth cause of action herein beginning on page 28 of said answer for the reasons hereinbefore stated, to-wit:

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's seventh cause of action" on page 29 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's eighth cause of action herein beginning on page 29 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 29 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 30 of said answer beginning with the word "but" in line 9 of said page 30 down and including the word "therefor" in line 22 on page 30 of said answer; also the portion of said subdivision II of

said answer beginning with the words "but denies" in line 31 on page 30 down to and including the word "premises" in line 6 on page 31 of said answer.

III.

All of that portion of said answer designated as III on page 31 thereof, save the admission therein contained, in lines 14-16 on page 31 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 32 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's eighth cause of action" on page 32 ~~thereof~~ of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's eighth cause of action" on page 33 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's ninth cause of action herein beginning on page 33 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 33 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 34 of said answer beginning with the word "but" in line 11 of said page 34 down and including

the word "therefor" in line 24 on page 34 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 34 of said answer down to and including the word "premises" in line 7 on page 35 of said answer.

III.

All of that portion of said answer designated as III on page 35 thereof, save the admission therein contained, in lines 16-18 on page 35 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 36 thereof.

V.

All of that portion of said answer desigated: "A separate, second and further defense to plaintiff's ninth cause of action" on page 36-37 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's ninth cause of action" on page 37 thereof.

And the said plaintiff demurs to those portions of the attempted defenses to plaintiff's tenth cause of action herein beginning on page 37 of said answer for the reasons hereinbefore stated, to-wit:

I.

All that portion of said answer designated as I on page 37 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 38 of said answer beginning with the word "but" in line 11 of said page down and including the word "therefor" in line 24 on page 38 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 38 of said answer down to and including the word "premises" in line 8 on page 39 of said answer.

III.

All of that portion of said answer designated as III on page 39 thereof, save the admission therein contained in lines 16-18 on page 39 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 40 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's tenth cause of action" on page 40 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's tenth cause of action" on page 41 thereof.

McINTIRE AND MURPHY,

Plaintiff's Attorneys.

Filed: Aug. 26, 1920. C. R. Garlow, Clerk.

And on said 26th day of August, 1920, said plaintiff served and filed her motion to strike certain parts

of said answer, which motion is in words and figures following (the pages referred to in said motion being the paging of original answer and appear in this transcript by the bracketed asterisked numbers in the answer), to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA, HELENA DIVISION.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant

MOTION.

Comes now the said plaintiff and moves the court to strike from the answer of defendant herein all and singular the parts and portions thereof hereinafter specifically designated for the reason that the same are sham, frivolous, irrelevant and immaterial; and for the reason that the same are insufficient in law on the face thereof to constitute a defense or counter-claim to plaintiff's several causes of action set forth in the complaint herein, or to any part thereof, to-wit:

I.

All that portion of said answer designated as II on page 1 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as III

on pages 1-2 of said answer beginning with the word "but" in line 32 of said page 1 down and including he word "therefor" in line 14 on page 2 of said answer; also the portion of said subdivision III of said answer beginning with the words "but denies" in line 22 on page 2 down to and including the word "premises" in line 29 on page 2 of said answer.

III.

All of that portion of said answer designated as IV on page 3 thereof, save the admission therein contained, in lines 5-7 on page 3 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as ~~VI~~ V on page 4 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's first cause of action" on page 4 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's first cause of action" on page 4 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's second cause of action" beginning on page 5 of said answer.

I.

All that portion of said answer designated as I on

page 5 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on pages 5-6 of said answer beginning with the word "but" in line 2 of said page 6 down and including the word "therefor" in line 16 on page 6 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 23 on page 6 down to and including the word "premises" in line 31 on page 6 of said answer.

III.

All of that portion of said answer designated as III on page 7 thereof, save the admission therein contained, in lines 8-10 on page 7 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 8 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's second cause of action" on page 8 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's second cause of action" on page 9 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plain-

tiff's third cause of action" beginning on page 9 of said answer.

I.

All that portion of said answer designated as I on page 9 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 9 of said answer beginning with the word "but" in line 5 of said page 10 down and including the word "therefor" in line 19 on page 10 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 28 on page 10 down to and including the word "premises" in line 3 on page 11 of said answer.

III.

All of that portion of said answer designated as III on page 11 thereof, save the admission therein contained, in lines 11-13 on page 11 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 12 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's third cause of action" on page 12 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's third cause of action" on page 13 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's fourth cause of action" beginning on page 13 of said answer.

I.

All that portion of said answer designated as I on page 13 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 14 of said answer beginning with the word "but" in line 4 of said page 14 down and including the word "therefor" in line 18 on page 14 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 26 on page 14 down to and including the word "premises" in line 1 on page 15 of said answer.

III.

All of that portion of said answer designated as III on page 15 thereof, save the admission therein contained, in lines 10-12 on page 15 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 16 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's fourth cause of action" on page 16 of said answer.

VI.

All that portion of said answer designated "A separate, third and further defense to plaintiff's fourth cause of action" on page 16 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's fifth cause of action" beginning on page 17 of said answer.

I.

All that portion of said answer designated as I on page 17 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 18 of said answer beginning with the word "but" in line 7 of said page 18 down and including the word "therefor" in line 20 on page 18 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 29 on page 18 down to and including the word "premises" in line 4 on page 19 of said answer.

III.

All of that portion of said answer designated as III on page 19 thereof, save the admission therein contained, in lines 12-14 on page 19 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 20 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's fifth cause of action" on page 20 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's fifth cause of action" on page 21 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's sixth cause of action" beginning on page 21 of said answer.

I.

All that portion of said answer designated as I on page 21 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 22 of said answer beginning with the word "but" in line 8 of said page 22 down and including the word "therefor" in line 21 on page 22 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 22 down to and including the word "premises" in line 5 on page 23 of said answer.

III.

All of that portion of said answer designated as III on page 23 thereof, save the admission therein contained, in lines 12-15 on page 23 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 24 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's sixth cause of action" on page 24 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's sixth cause of action" on page 24 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's seventh cause of action" beginning on page 25 of said answer.

I.

All that portion of said answer designated as I on page 26 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 26 of said answer beginning with the word "but" in line 9 of said page 26 down and including the word "therefor" in line 21 on page 26 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 30 on page 26 down to and including the word "premises" in line 5 on page 27 of said answer.

III.

All of that portion of said answer designated as III

on page 27 thereof, save the admission therein contained, in lines 13-15 on page 27 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 28 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's seventh cause of action" on page 28 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's seventh cause of action" on page 29 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's eighth cause of action" beginning on page 29 of said answer.

I.

All that portion of said answer designated as I on page 29 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 30 of said answer beginning with the word "but" in line 9 of said page 30 down and including the word "therefor" in line 22 on page 30 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line

31 on page 30 down to and including the word "premises" in line 6 on page 31 of said answer.

III.

All of that portion of said answer designated as III on page 31 thereof, save the admission therein contained, in lines 14-16 on page 31 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 32 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's eighth cause of action" on page 32 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's eighth cause of action on page 33 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's ninth cause of action" beginning on page 33 of said answer.

I.

All that portion of said answer designated as I on page 33 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 34 of said answer beginning with the word "but" in line 11 of said page 34 down and including the

word "therefor" in line 24 on page 34 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 34 of said answer down to and including the word "premises" in line 7 on page 35 of said answer.

III.

All of that portion of said answer designated as III on page 35 thereof, save the admission therein contained, in lines 16-18 on page 35 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 36 thereof.

V.

All of that portion of said answer designated: "A separate, second and further defense to plaintiff's ninth cause of action" on pages 36-37 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's ninth cause of action" on page 37 thereof.

And the said plaintiff for the same reasons and on the same grounds moves the court to strike from that portion of said answer reading "For answer to plaintiff's tenth cause of action" beginning on page 37 of said answer.

I.

All that portion of said answer designated as I on page 38 of said answer after the name Mary M. Smith in the second line of said paragraph.

II.

All that portion of said answer designated as II on page 38 of said answer beginning with the word "but" in line 11 of said page 38 down and including the word "therefor" in line 24 on page 38 of said answer; also the portion of said subdivision II of said answer beginning with the words "but denies" in line 32 on page 38 of said answer down to and including the word "premises" in line 8 on page 39 of said answer.

III.

All of that portion of said answer designated as III on page 39 thereof, save the admission therein contained, in lines 16-18 on page 39 of non-payment since October 14, 1910.

IV.

All of that portion of said answer designated as V on page 40 thereof.

V.

All of that portion of said answer designated: "A sepárate, second and further defense to plaintiff's tenth cause of action" on page 40 of said answer.

VI.

All that portion of said answer designated: "A separate, third and further defense to plaintiff's tenth cause of action" on page 41 thereof.

McINTIRE AND MURPHY,
Plaintiff's Attorneys.

Filed: Aug. 26, 1920.
C. R. Garlow, Clerk.

That thereafter said motion to strike and demurrer of plaintiff to certain parts of said answer of defendant having come on regularly for hearing and being argued to the court and by the court taken under advisement, the court on the 30th day of October, 1920, rendered its opinion upon said motion and demurrer in words and figures following, to-wit:

UNITED STATES DISTRICT COURT—MONTANA.

McNaught

vs.

Hoffman.

The pleadings referred to, although not always easy to distinguish trusts and covenants, from conditions subsequent, the conclusion of the Montana Supreme Court that the involved transaction between Smith and defendant is of the latter category, is clearly right.

No intent to create a trust or gift in trust appears, for the payments to plaintiff are not charged upon the body or rents of the property involved, and on the whole are optional with defendant. No covenant is indicated beyond that implied from the language that by defendant, "not less than $50. per mo. be paid to" plaintiff "for an unlimited time and the deed then will stand good until" defendant's marriage or death, reversion to the grantor Smith or heirs. Therein defendant does not covenant to pay in any event, but only to pay so long as she elects to hold the property secure from re-entry by Smith or heirs. If defendant fails to pay, she is not subject to suit

for damages or to compel payment by even Smith or heirs, much less by plaintiff.

In such contingency defendant is only liable to divestiture of her estate in the property, if Smith or heirs elect to take advantage of defendant's breach, and re-enter upon the property.

The language of the agreement involved crudely sets forth that the payments to plaintiff are of a condition subsequent. If made, "the deed then will stand good." If not made, the deed will no longer "stand good," and the property reverts to Smith or heirs—if they choose to re-enter, because of the failure to pay. If they do not choose to re-enter, but waive the breach, plaintiff cannot take advantage of the breach. And all this is "horn book" law.

Hence, the matter in the answer, alleging that Smith did waive the breach of the condition (defendant's failure to pay plaintiff) is material to the defense, if proven is a good defense, and the motion to strike it is denied and the demurrer to it is overruled.

BOURQUIN
J

October 30, 1920.

Filed: Oct. 30, 1920. C. R. Garlow, Clerk.

That thereafter on November 19, 1920, a reply was filed to said answer which is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MONTANA, HELENA DIVISION.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

REPLICATION.

Comes now the above named plaintiff, Ollie N. McNaught, and files and presents this her reply or replication to the answer of defendant herein.

I.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the first count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the first count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint

herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the first count or cause of action set forth in the complaint as in said complaint prayed.

II.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the second count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the Said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to

the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that the said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the second count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the second count or cause of action set forth in the complaint as in said complaint prayed.

III.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the third

count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had under-

taken toward this plaintiff under and by vitrue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up destroyed or in anywise waived annulled or set aside.

(d) Plaintiff denies that the third count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2 of Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the third count or cause of action set forth in the complaint as in said complaint prayed.

IV.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the fourth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations

and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the fourth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract

set forth in paragraph 2 of Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the fourth count or cause of action set forth in the complaint as in said complaint prayed.

V.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the fifth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of the said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the

said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the fifth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the fifth count or cause of action set forth in the complaint as in said complaint prayed.

VI.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and alleged the sixth

count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve

the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the sixth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the sixth count or cause of action set forth in the complaint as in said complaint prayed.

VII.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the seventh count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M.

Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the seventh count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the seventh count or cause of action set forth in the complaint as in said complaint prayed.

VIII.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the eighth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and be-

lief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the eighth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the eighth count or cause of action set forth in the complaint as in said complaint prayed.

IX.

As and for her reply or replication to the said

answer which in anywise controverts the allegations of the complaint which set forth and allege the ninth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented

thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the ninth count or cause of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the ninth count or cause of action set forth in the complaint as in said complaint prayed.

X.

As and for her reply or replication to the said answer which in anywise controverts the allegations of the complaint which set forth and allege the tenth count or cause of action in said complaint stated:

(a) She denies that the agreement or contract set forth in paragraph 2 of Division II of said complaint was entered into otherwise than mutually by the parties thereto, to-wit, Mary M. Smith and Sadie Hoffman; denies that the same was without consideration passing and given by the said Mary M. Smith to and

received by the said Sadie Hoffman therefor, but on the contrary she avers and alleges that there was full and good consideration from the said Mary M. Smith to the said Sadie Hoffman for all the obligations and promises therein and thereby on the part of the latter to be performed.

(b) She denies that the understanding and agreement between the said Mary M. Smith and Sadie Hoffman in and about the making, delivering and entering into by and between them of the said agreement or contract was otherwise than is therein stated and set forth.

(c) Plaintiff admits upon her information and belief that on or about the 9th day of October, 1910, the said Mary M. Smith wrote a letter or writing to the said Sadie Hoffman of the terms and tenor set forth in said answer, but she avers and alleges that the same was the voluntary act of the said Mary M. Smith and that the same was and is wholly without consideration for anything therein contained; that the same was wholly without the knowledge of the plaintiff, and that she, plaintiff, has never consented thereto, or in anywise acquiesced therein; and she denies that said letter or writing was intended to or did relieve the defendant from the obligations she had undertaken toward this plaintiff under and by virtue of said agreement or contract set forth in paragraph 2 of Division II of the complaint herein; and she denies that the last named agreement or contract was ever burned up, destroyed, or in anywise waived, annulled or set aside.

(d) Plaintiff denies that the tenth count or cause

of action set forth in the complaint herein is barred by or under any statute of limitations of the State of Montana, or at all.

(e) She denies that the agreement or contract set forth in paragraph 2, Division II of the complaint herein has ever been rescinded, annulled, or held for naught.

WHEREFORE, plaintiff prays for judgment on the tenth count or cause of action set forth in the complaint as in said complaint prayed.

WHEREFORE, plaintiff prays for judgment as in her complaint herein.

McINTIRE & MURPHY,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,
STATE OF MONTANA,
County of Lewis and Clark,—ss.

HOMER G. MURPHY, being duly sworn, says: That he resides in Helena, Lewis and Clark County, Montana; that he is one of the attorneys for plaintiff in the above entitled action, and as such makes this affidavit and verification in her behalf for the reason that the said plaintiff is not now within said county of Lewis and Clark, or within the State of Montana; that affiant has read the foregoing reply or replication, and knows the contents thereof, and that the matters and things therein contained are true to the best knowledge, information and belief of affiant.

Homer G. Murphy.

Subscribed and sworn to before me this 18th day

of November, 1920.

(SEAL) Clara E. Bower,
Notary Public for the State of Montana, residing at Helena, Montana. My commission expires Sept. 24th, 1921.

Due service of within Reply and receipt of a copy thereof this 19th day of Nov., 1920, is hereby admitted and acknowledged.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Defendant.

Filed: Nov. 19, 1920.
C. R. Garlow, Clerk.

That thereafter on the 3rd day of January, 1921, defendant served and filed herein her motion for judgment on the pleadings in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,
Plaintiff,

vs.

SADIE HOFFMAN,
Defendant.

DEFENDANT'S MOTION FOR JUDGMENT.

Now comes the defendant in the said above entitled cause, and moves the Court for judgment on the pleadings in said action, upon the ground that the said contract or agreement between this defendant and Mary

M. Smith, set out in plaintiff's complaint, and upon which the plaintiff bases her claim and right to recover the monthly payments of $50.00 each provided for in said contract, imposes no duty or obligation upon this defendant to make such payments, but whether she do so or not is optional with her, and the only remedy for defendant's failure to make such payment or payments is that provided for by the contract itself, and which remedy is exclusive, and of which only the other party to the contract, to-wit, Mary M. Smith, may avail herself.

This motion is based upon the pleadings on file in said cause; the decision of this Court, made and rendered herein upon the plaintiff's motion to strike out certain parts of the defendant's answer; and upon the plaintiff's demurrer to said answer; and upon the decision of the Supreme Court of the State of Montana, in the case of Smith v. Hoffman, 56 Mont. 299.

Dated this 3rd day of January, 1921.

BELDEN & DeKALB and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Due service of within Motion and receipt of a copy thereof this 3rd day of Jan., 1921, is hereby admitted and acknowledged.

McINTIRE & MURPHY,
Attorneys for Plaintiff.

Filed: Jan. 3, 1921. C. R. Garlow, Clerk.

Thereafter on the January 6, 1921, plaintiff served and filed herein her counter motion for judgment on

the pleadings which is in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

COUNTER-MOTION.

Comes now the above named plaintiff and as and for a counter-motion to that of defendant for judgment on pleadings in the present action she, said plaintiff, does now move the court that judgment on the pleadings herein in her favor and against said defendant in accordance with the prayer of the complaint be ordered and rendered.

Dated January 6, 1921.

McINTIRE & MURPHY,

Plaintiff's Attorneys.

Filed: Jan. 6, 1921.

C. R. Garlow, Clerk.

That thereafter on January 6, 1921, said motion of defendant for judgment on the pleadings herein and the counter-motion of plaintiff for judgment on the pleadings came on regularly for hearing, were argued by counsel, and by the court taken under advisement, and thereafter on January 7, 1921, rendered

its opinion on said motions, which opinion is in words and figures following, to-wit:

UNITED STATES DISTRICT COURT, MONTANA.

McNaught vs. Hoffman.

Herein, defendant's motion for judgment on the pleadings is granted, and plaintiff's like motion is denied.

The decision heretofore herein is conclusive—the law of conditions subsequent applies and plaintiff is without any right or remedy. It would be supererogatory to distinguish the cases cited by counsel. The last paragraph of said decision is inadvertence, and the motion therein determined had better been denied for that the complaint states no cause of action. Earlier in the decision the law of conditions subsequent appears clearly enough.

Bourquin, J.

Jan. 7, 1921.

Filed: Jan. 7, 1921. C. R. Garlow, Clerk.

That thereafter on January 24, 1921, judgment was duly rendered and entered herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

JUDGMENT.

This cause came on duly and regularly to be heard on the 6th day of January, 1921, on defendant's motion for judgment in her favor and against said plaintiff on the pleadings herein, and on the counter-motion of plaintiff for judgment in her favor and against said defendant on the pleadings, the respective parties were represented by counsel who argued said motions which were thereupon submitted, whereupon the court sustained and granted the said motion of defendant and overruled and denied said counter-motion of the plaintiff, and ordered and rendered judgment herein in favor of said defendant and against said plaintiff which was done accordingly.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid it IS ORDERED AND ADJUDGED that said plaintiff, Ollie N. McNaught, take nothing by her said suit, and that the defendant, Sadie Hoffman, do hence go without day.

Judgment entered Jan. 24, 1921.

C. R. Garlow,
Clerk.

That thereafter on January 25, 1921, plaintiff filed her assignment of errors herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT, OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

ASSIGNMENT OF ERRORS.

Now comes the above named plaintiff, Ollie N. McNaught, by McIntire and Murphy, her attorneys, and with her petition for the allowance of a writ of error herein, presents and files this her assignment of errors, and by way thereof she avers and alleges that in the record and proceedings and in the judgment of said District Court in said cause, there is manifest error in this, to-wit:

1. The said District Court erred in overruling the demurrer of said plaintiff to the designated parts of defendant's answer herein;

2. The said District Court erred in not sustaining the demurrer of said plaintiff to the designated parts of defendant's answer herein;

3. The said District Court erred in overruling and denying the motion of said plaintiff to strike out the designated parts of defendant's answer herein;

4. The said District Court erred in not sustaining the motion of said plaintiff to strike out the designated parts of defendant's answer herein;

5. The said District Court erred in granting and sustaining the motion of defendant for judgment on the pleadings herein;

6. The said District Court erred in overruling and denying plaintiff's counter-motion for judgment on the pleadings herein in her favor and against said defendant.

7. The said District Court erred in ordering and entering judgment herein in favor of said defendant and against said plaintiff;

8. The said District Court erred in not ordering and entering judgment in favor of the plaintiff and against the defendant herein;

9. The said District Court erred in that the judgment ordered and entered herein in favor of said defendant and against said plaintiff is contrary to the admitted facts appearing on the pleadings herein, and is contrary to the law applicable to such facts.

WHEREFORE, and for divers other reasons appearing in the record and proceedings herein, said plaintiff in error prays that the judgment of the District Court in favor of said defendant and against said plaintiff be reversed and set aside; that this Honorable Court do order the said District Court to order and enter judgment in favor of said plaintiff and against said defendant in accordance with the prayer of plaintiff's complaint herein; and for such relief as may

be just.

Dated Jan. 25th, 1921.

McINTIRE & MURPHY,
Attorneys for Plaintiff in Error.
Plaintiff in the Court below.

Filed: Jan. 25, 1921. C. R. Garlow, Clerk.

On January 25, 1921, petition for writ of error was duly filed herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

PETITION FOR WRIT OF ERROR.

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes the said Ollie N. McNaught, the plaintiff herein, and says that on the 24th day of January, 1921, at the November Term, 1920, of the said court a judgment was rendered and entered in favor of the defendant in the above entitled cause, and against the said plaintiff in which said judgment and the record of proceedings had prior thereto in said cause certain manifest errors have intervened to the great prejudice of said plaintiff, which errors are specified in detail

in the assignment of errors which is filed with this petition; wherefore the plaintiff in the above entitled cause feeling herself aggrieved by the judgment of the Court rendered thereon and entered herein, comes now by McIntire and Murphy, her attorneys, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the correction of the errors so complained of; and also that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

And the said plaintiff herewith presents her assignment of errors in accordance with the rules of said United States Circuit Court of Appeals, and the course and practice of this Honorable Court.

And your petitioner will ever pray.

McINTIRE & MURPHY,

Attorneys for Plaintiff.

Filed: Jan. 25, 1921.

C. R. Garlow, Clerk.

That on January 25, 1921, an order allowing writ of error and fixing bond was duly made and entered

herein in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

ORDER ALLOWING WRIT OF ERROR, etc.

This 25th, day of January, 1921, came the above named plaintiff, by her attorneys, and filed herein and presented to the Court her petition praying for the allowance of a writ of error intended to be urged by her, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the said plaintiff giving bond according to law, in the sum of Three hundred dollars, which shall operate as a supersedeas bond.

BOURQUIN,

Judge.

Filed and entered: Jan. 25, 1921. C. R. Garlow, Clerk.

Thereafter on January 25, 1921, bond on writ of error was duly filed herein being in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, OLLIE N. McNAUGHT, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, as surety, are held and firmly bound unto the above named Sadie Hoffman, defendant in error herein, in the full and just sum of Three hundred dollars ($300.00), to be paid to the said Sadie Hoffman, her heirs, executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves, our successors, assigns, executors and administrators jointly and severally by these presents.

Signed and dated this 25th day of January, A. D. 1921.

WHEREAS lately at a regular term of the District Court of the United States for the District of Montana, sitting at Helena, Montana, in said District Court

in the above entitled action, final judgment was rendered against the said Ollie N. McNaught, and the said Ollie N. McNaught has obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court in the aforesaid matter and a citation directed to the said Sadie Hoffman, defendant in said proceeding, and her attorneys, Messrs. Belden & DeKalb, & Gunn, Rasch & Hall, citing her to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco, in the State of California, according to law, within thirty days from the date hereof.

Now the condition of the above obligation is such that if the said Ollie N. McNaught shall prosecute her writ of error to effect and answer all damages and costs and comply in all respects with the said judgment if she fails to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

OLLIE N. McNAUGHT,
Principal.

By H. G. McINTIRE,
HOMER G. MURPHY,
Her Attorneys.

American Surety Company of New York
By W. D. Habish
Resident vice president.
Attest:
F. M. Scharpf
Resident assistant secretary.
(Corporate Seal)

STATE OF MONTANA,
County of Lewis and Clark,—ss.

On this 25th day of January, 1921, before me, Clara E. Bower, a notary public for the State of Montana, residing in the city of Helena, came W. D. Habish, resident vice president of the American Surety Company of New York, to me personally known to be the resident vice president of said American Surety Company, a corporation, described in and which executed as surety the annexed bond, and being by me first duly sworn, stated that he, as resident vice president and F. M. Scharpf as resident assistant secretary, duly executed the preceding instrument by order and authority of the directors of the said American Surety Company, and that the seal affixed to the preceding instrument is the corporate seal of the said company, that the said corporate seal was duly affixed by the authority of the directors of the said company; that the said American Surety Company is duly and legally incorporated under the laws of the State of New York, is authorized under its charter to transact and is transacting the business of a Surety Company in the State of Montana; that said company has complied with all the laws of the State of Montana relating to surety companies doing business in that State; and is duly licensed and legally authorized by said State to qualify as sole surety on the bond hereto annexed; that the said company is authorized by its Articles of Incorporation and by its by-laws to execute the said bond; and that said company has assets consisting of capital stock paid in cash and surplus over and above

all liabilities of every kind exceeding the sum of One Million Dollars, and that said affiant, and F. M. Scharpf have been duly authorized by the Board of Directors of the company to execute the foregoing bond.

W. D. Habish

Subscribed and sworn to before me this 25th day of January, 1921.

(SEAL) Clara E. Bower,
Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires Sept. 24, 1921.

The foregoing bond is hereby approved January 25, 1921.

Bourquin, Judge.

Filed: Jan. 25, 1921. C. R. Garlow, Clerk.

That thereafter on January 25, 1921, writ of error was duly issued herein, which writ is hereto annexed and is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you between Ollie N. McNaught, plaintiff, and Sadie Hoffman, defendant, a manifest error has happened to the damage of said Ollie N. McNaught, as by her complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting,

within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals, may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 25th day of January, 1921.

C. R. Garlow,
Clerk U. S. District Court,
District of Montana.
By H. H. Walker,
Deputy Cleerk of the United States District Court for the District of Montana.

The above writ of error is allowed this 25th day of January, 1921.

Bourquin,
District Judge.

We hereby this 25th day of January, 1921, accept due personal service of the foregoing writ of error on behalf of the defendant in error and acknowledge receipt of a true copy of said writ of error.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.

Filed: Jan. 25, 1921.
C. R. Garlow, Clerk.

That thereafter on January 25, 1921, a citation on

said writ of error was duly issued herein, which citation is hereto attached and is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES TO SADIE HOFFMAN, DEFENDANT IN ERROR, and HER ATTORNEYS, MESSRS. BELDEN & DeKALB and GUNN, RASCH & HALL, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Ollie N. McNaught is palintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not

be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, this 25th day of January, A. D. 1921, and of the Independence of the United States the 145th year.

Bourquin,
District Judge.

ATTEST:

C. R. Garlow
Clerk U. S. District Court,
District of Montana.

By H. H. Walker,
Deputy Clerk United States District Court, District of Montana.

(SEAL)

We hereby this 25th day of January, 1921, accept due personal service of the foregoing citation on writ of error on behalf of the defendant in error and acknowledge receipt of a true copy of said citation on writ of error.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.

Filed: Jan. 25, 1921. C. R. Garlow, Clerk.

That thereafter on January 25, 1921, praecipe for transcript of record was served and filed herein and is in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,

Plaintiff,

vs.

SADIE HOFFMAN,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error heretofore allowed by said court, and include in the said transcript the following pleadings, proceedings, and papers on file, to-wit:

Plaintiff's complaint; defendant's demurrer to plaintiff's complaint; defendant's answer; plaintiff's demurrer to parts of said answer; plaintiff's motion to strike out parts of said answer; order of court overruling and denying said demurrer and motion together with the memorandum opinion of the court thereon; plaintiff's replication to defendant's answer; defendant's motion for judgment on the pleadings; plaintiff's counter-motion for judgment on the pleadings; the order of court disposing of said last mentioned motions together with such memorandum opinion as the court

may have made thereon; the judgment made and entered herein; the several minute entries and orders made and entered herein; the petition for writ of error and the allowance thereof; assignment of errors; the bond on writ of error and approval thereof; the writ of error with the return thereto; the citation with proof of service thereof. Such transcript to be prepared as required by law and the rules of this court and the rules of the court of the United States Circuit Court of Appeals for the Ninth Circuit and to be on file in the office of the clerk of said Circuit Court at San Francisco, California, within thirty days from the signing of said citation, to-wit, ~~January 25~~ Feb. 24, 1921.

McINTIRE & MURPHY,
Attorneys for Plaintiff in Error.

Due service service of within Praecipe and receipt of copy thereof this 25th day of January, 1921, is hereby admitted and acknowledged.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Plaintiff.

Filed: Jan. 25, 1921.
C. R. Garlow, Clerk.

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of

the United States, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

(SEAL) C. R. Garlow,
Clerk.

Thereafter on the 21st day of February, 1921, there was filed and entered herein a stipulation for and order for enlargement of time in which to file record in the Circuit Court of Appeals in words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

OLLIE N. McNAUGHT,
Plaintiff,

vs.

SADIE HOFFMAN,
Defendant.

STIPULATION FOR ENLARGEMENT OF TIME IN WHICH TO FILE RECORD IN CIRCUIT COURT OF APPEALS.

WHEREAS, on January 25th, 1921, a Writ of Error to the United States District Court for the District of Montana was duly allowed and issued on behalf of the plaintiff, Ollie N. McNaught, in the above entitled cause, pursuant to an Order of Court author-

izing the issuance of the same, and citation was duly issued and served on said date; and,

WHEREAS, unavoidable delay has occurred in printing the transcript of the Record on said Writ of Error;

NOW, THEREFORE, it is hereby stipulated and agreed, by and between plaintiff, Ollie N. McNaught, and the defendant, Sadie Hoffman, that the time in which to make return to said writ of error in the United States Circuit Court of Appeals for the Ninth Circuit is hereby enlarged and extended for a period of thirty days, in addition to the time prescribed by the rules of said Circuit Court of Appeals, and that the plaintiff in error, Ollie N. McNaught, may have such additional time in which to file the record in said cause and docket the same in the office of the Clerk of said United States Circuit Court of Appeals at San Francisco.

And consent is hereby given that an order may be made by the Judge of the United States District Court, for the District of Montana, who allowed said writ of error and signed the citation, enlarging the time for the making of said return and the filing of said record, in accordance with this stipulation.

McINTIRE & MURPHY,
Attorneys for Plaintiff in Error.

BELDEN & DeKALB,
GUNN, RASCH & HALL,
Attorneys for Defendant in Error.

ORDER.

For good cause shown, IT IS HEREBY ORDERED that the plaintiff, Ollie N. McNaught, have, and she is hereby granted thirty days, in addition to the time prescribed by the rules of the United States Circuit Court of Appeals, for the Ninth Circuit, in which to make return to the writ of error issued herein and file the record in said cause and docket the same in the office of the Clerk of said Circuit Court of Appeals.

Dated this 21st day of February, 1921.

Bourquin,
District Judge.

Entered and filed Feb. 21, 1921.

C. R. Garlow, Clerk.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
District of Montana,—ss.

I, C. R. GARLOW, Clerk of the United States District Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consists of.....pages, numbered consecutively from 1 to....., inclusive, and is a true, full and correct transcript of the record and all proceedings had in said cause and of the whole

thereof, including all the pleadings, orders, opinion of the court and judgment, together with petition for writ of error, assignments of error, order allowing writ of error, bond, writ of error, citation on writ of error, præcipe for transcript and answer of court to writ of error, as appears from the original records and files of said court in my possession as said clerk; and I further certify and return that I have annexed to said transcript and included within said paging, the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifty seven 80/100 Dollars ($ 57.80), and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Helena, Montana, this 5 day of March, A. D. 1921.

Court Seal

C. R. Garlow

Clerk of the United States District Court for the District of Montana.

By H. H. Walker - Deputy

No. 3659

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

McINTIRE AND MURPHY,

Attorneys for Plaintiff in Error.

H. G. McINTIRE

Of Counsel.

Thurber Co., Helena, Mont.

No.....

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

STATEMENT OF THE CASE.

Plaintiff in error, a citizen of the State of California, on June 25, 1920, filed her complaint and began the present action in the District Court of the District of Montana against the defendant in error, a citizen of the State of Montana, to recover judgment for Fifty-eight hundred dollars ($5800.00), besides interest at the Montana rate of eight per cent per annum, for moneys alleged to be due to her, and unpaid, from defendant in error (Trans. pp. 1-30). To this complaint the defendant in error on July 16, 1920, filed a general demurerr, but afterwards withdrew the same (Trans. p. 34), and on August 16, 1920, filed an answer (Trans. pp. 34-88). To test the sufficiency of this answer, the plaintiff in error on August 26, 1920, filed a demurrer to portions of it (Trans. pp. 88-99) on the grounds permitted by the state statute, i. e., insufficiency of facts to constitute a defense or counter-claim, and insufficiency in law on the face thereof, and at the same time filed a motion to strike out the same matters from the answer (Trans. pp. 100-111) as being frivolous, irrelevant and immaterial and as being insufficient in law to constitute a defense or counter-claim. The demurrer and motion were argued and submitted, and on October 20, 1920, were overruled and denied, the court handing down a written opinion (Trans. pp. 112, 113). Thereafter on November 19, 1920, plaintiff in error filed a reply to this answer (Trans. pp. 114-131). On January 3, 1921, defendant in error filed a motion for judgment on the

pleadings (Trans. pp, 132, 133), and plaintiff in error on January 6, 1921, filed a counter-motion for judgment on the pleadings in her behalf (Trans. p. 134). These two motions were argued and submitted, and on January 7, 1921, that of defendant in error was sustained and that of plaintiff in error denied, the court handing down a brief memorandum opinion. (Trans. p. 135). Judgment was thereupon rendered and entered in favor of defendant in error and against plaintiff in error (Trans. p. 136), and to review this action of the lower court the present writ of error is prosecuted.

The complaint is divided into ten counts or causes of action. They each set out a claim in favor of plaintiff against the defendant for Six hundred dollars ($600.00), being twelve monthly payments of Fifty dollars ($50.00) each with interest on the sum of the installments at eight per cent per annum from the end of each annual rest, viz: October, 14, 1911; and the like date for each succeeding year down to and including October 14, 1919, the tenth count being for Fifty dollars ($50.00) for each and every month from and after October 14, 1919, to the commencement of the action, a consideration of any one of the counts then, will suffice to grasp the case of plaintiff in error. We therefore condense for the use of this court one of the counts, e. g. the first, viz:

Paragraph I sets forth the jurisdictional prerequisites; II avers that plaintiff in error is the sister of one Mary M. Smith, who was and is the owner of two

certain town lots situated in Lewistown, Montana, on which there was and is a rooming house or hotel known as the Hoffman House; III avers that on March 14, 1910, said Mary M. Smith conveyed said premises by deed to the defendant in error, and that contemporaneously with the deed, and as a part of the same transaction, and for the purpose of evidencing the nature and intent of such transaction, the said parties made and executed a certain agreement in writing as follows:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs. Signed and sealed:
>
> Mary M. Smith
> Sadie Hoffman."

and it is further averred in said paragraph that the deed referred to in this agreement was intended to refer to the said deed from Mrs. Smith to Mrs. Hoffman; that the name therein, Mrs. J. A. McNaught, refers to the plaintiff in error; and that there was no other consideration for such deed than the carrying out by defendant in error of the conditions of such contract; that such papers were thereupon delivered;

that defendant in error in pursuance of the transaction, evidenced as above stated, entered into the possession and enjoyment of said premises, and still continues therein; that in pursuance of the said transaction defendant in error paid to plaintiff in error Fifty dollars ($50.00) a month down to October 14, 1910, but since then has failed and refused to make any further payments, although demand for such payments has often been made.

After filing and withdrawing a general demurrer to this complaint, and each of its ten counts, the defendant in error filed an answer, This answer admits the salient allegations of the complaint, but it contains much irrelevant matter, not constituting a defense, and hence the demurrer and motion to strike out portions of the same above referred to. This demurrer and motion were argued, and after the decision of the court thereon (Trans. p. 112-113) plaintiff in error filed her replication to all portions of the answer which in any wise might be considered a denial of the allegations of the complaint, thus raising an issue as to any new matter in the answer. All of the denials of the answer, however, must, we conceive, be considered as withdrawn and abandoned by reason of the motion for judgment on the pleadings of January 3, 1921, filed by defendant in error (Trans. pp. 132-133), the gist of which is:

> "The said contract or agreement between this defendant and Mary M. Smith, set out in plaintiff's complaint, and upon which the plaintiff

> bases her claim and right to recover the monthly payments of $50.00 each provided for in said contract, imposes no duty or obligation upon this defendant to make such payments, but whether she do so or not is optional with her, and the only remedy for defendant's failure to make such payment or payments is that provided for by the contract itself, and which remedy is exclusive, and of which only the other party to the contract, to-wit, Mary M. Smith, may avail herself,"

and the allegations of the complaint, and such explanatory matter as is contained in the replication must be deemed admitted. This motion of defendant in error left no recourse to plaintiff in error except a counter-motion for judgment in her favor on the pleadings as they stood by reason of the motion of defendant in error, and hence such motion of January 6, 1921 (Trans. p. 134). This latter motion being overruled and that of defendant in error sustained (See Opinion of Court, Trans. p. 135) judgment necessarily followed in favor of defendant in error, to review which this writ of error is directed.

SPECIFICATIONS OF ERROR.

1. The said District Court erred in overruling the demurrer of said plaintiff in error to the designated parts of the answer of defendant in error herein;

2. The said District Court erred in not sustaining the demurrer of said plaintiff in error to the designated parts of the answer of defendant in error herein;

3. The said District Court erred in overruling and denying the motion of said plaintiff in error to strike out the designated parts of the answer of defendant in error herein;

4. The said District Court erred in not sustaining the motion of said plaintiff in error to strike out the designated parts of the answer of defendant in error herein;

5. The said District Court erred in granting and sustaining the motion of defendant in error for judgment on the pleadings herein;

6. The said District Court erred in overruling and denying the counter-motion of plaintiff in error for judgment on the pleadings herein in her favor and against said defendant in error;,

7. The said District Court erred in ordering and entering judgment herein in favor of said defendant in error and against said plaintiff in error;

8. The said District Court erred in not ordering and entering judgment in favor of the plaintiff in error and against the defendant in error herein;

9. The said District Court erred in that the judgment ordered and entered herein in favor of said defendant in error and against said plaintiff in error is contrary to the admitted facts appearing on the pleadings herein, and is contrary to the law applicable to such facts.

ARGUMENT.

The specifications of error Nos. 5, 6, 7, 8 and 9 involve the essential points that we desire to urge upon this court, indeed, they may be deemed summarized in that numbered 9, which we repeat, viz:

> "The said District Court erred in that the judgment ordered and entered herein in favor of said defendant in error and against said plaintiff in error is contrary to the admitted facts appearing on the pleadings herein, and is contrary to the law applicable to such facts."

which we now proceed to elaborate.

I.

The agreement (Trans. pp. 2-3) accompanying the deed, Exhibit A of the complaint (Trans. pp. 28-30), provides for the payment to plaintiff in error of Fifty dollars a month "for an unlimited time." It is admitted by the motion for judgment on the pleadings that that sum was actually paid by defendant in error to plaintiff in error for the seven months from March 14, 1910, to October 14, 1910, but that nothing has since then been paid. At the time this suit was filed, June 25, 1920, there were consequently 118 monthly payments past due and unpaid. Instead of setting up such 118 independent breaches, as separate and distinct causes of action, and asking for the appropriate interest from each breach, as might have been done, the complaint is subdivided into ten counts or causes of action, with yearly interest from the end

of each respective year. This method brings about a material diminution of the amount of interest plaintiff in error is clearly entitled to, but as the method pursued enures to the benefit of the defendant in error she cannot complain of it.

II.

The gist of the present controversy has been thoroughly threshed out in an action in the State courts between the parties to the said deed and the accompanying agreement, in which the grantor, Mary M. Smith, was plaintiff, and the grantee, Sadie Hoffman (defendant in error herein) was defendant. The plaintiff in error was not made a party to said action, but we do not think it out of place to advert to the fact that there was an express finding of fact therein that she knew of and consented to the bringing and maintenance of said action. The case referred to finally reached the Supreme Court of Montana and was there determined in an elaborate opinion in favor of plaintiff therein and against defendant in error herein, all the justices concurring. It is reported, Smith v. Hoffman, 56 Mont. 299, 184 Pac. 842. By that case it is decided that the said deed and the said agreement are valid, and under the Montana statute, Rev. Codes § 5031, which is as follows:

> "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together,"

are to be taken and construed together. The opinion in that regard, we cite from the syllabus, being:

> "*Held*, under section 5031, Revised Codes, that a deed made upon a condition subsequent imposed by a separate writing, under the terms of which the grantee obligated herself to make a stipulated monthly payment to a third person, with reversion in favor of the grantor, were part of and constituted the same transaction, regardless of whether they were executed at the same time or not."

See also Chicago etc. Co. v. Chicago T. & T. Co., 60 N. E. 586.

III.

The transaction, evidenced by the writings, for the benefit of plaintiff in error may be regarded as (1) a gift; as (2) a contract made for the benefit of a third person, viz, plaintiff in error; as (3) a trust wherein Mrs. Smith is trustor, the defendant in error, Mrs. Hoffman, is trustee, and Mrs. McNaught, plaintiff in error, is beneficiary, or *cestui que trust;* as (4) a conveyance on condition subsequent, which latter view the Supreme Court of Monatna adopts in its opinion in said case.

A gift is defined as a transfer of personal property (and a chose in action is personal property for "every kind of property that is not real is personal." Montana Rev. Codes § 4430), made voluntarily and without consideration (Montana Rev. Codes § 4635),

and cannot be revoked by the giver. (Montana Rev. Codes § 4637). Thus in Pullen v. Placer Co. Bank, 138 Cal. 169, 66 Pac. 740, Am. St. Rep. 19, it is held:

> "Where a party delivers a negotiable check on a bank to another, though he thereafter requests that it be not presented for payment till after his death, the payee gains such possession and control of the thing to be given as constitutes a completed and perfected gift."

And see 12 Ruling Case Law, Title: Gifts, Nos. 18, 19, 20, 23, 24, 27.

IV.

Montana Rev. Codes § 4970 provides:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

That such a contract, or agreement, as the one here presented cannot be rescinded without the consent of Mrs. McNaught, the plaintiff in error, is self-evident. It is an executed gift, a vested property right, and there is a constitutional inhibition against depriving a person of property without due process of law. It is not deemed necessary to more than further observe that a logical carrying out of a claim or right to rescind on the part of the trustor and trustee in derogation of the rights of a *cestui que trust* would abolish the whole law of trusts. As to the force and effect which are to be given to the transaction in ques-

tion the following quotation from Washer v. Independent M. & D. Co., 142 Cal. 702, 76 Pac. on page 656, construing the like California statute, will demonstrate, viz:

> "It does not lie in the mouth of defendant to say there is no privity, after it took the deeds signed by Stephens and Banta. The payment of the amount due plaintiff was clearly a part of the purchase money to be paid by defendant. It was nothing to defendant as to whom the purchase money should be paid. If its grantors requested the payment of $4,500 to plaintiff, and defendant agreed to pay said sum, it will not be allowed to defend this action upon the ground that its grantors did not owe plaintiff. It is not the business of the defendant to go upon a tour of investigation as to the merits of plaintiff's claim against its grantors after agreeing to pay it. If its grantors were satisfied that they owed plaintiff, defendant cannot, after agreeing to pay the said indebtedness, claim that nothing was due. It was said by the Supreme Court of Pennsylvania in Merriman v. Moore, 90 Pa. 81: 'A vendor may direct how the purchase money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views, and if his vendee agrees to pay it, according to such directions, he cannot set up a defense that his vendor was under no duty to

apply it in such manner.' See Warvelle on Vendors (2d Ed.) § 649; Dean, Use, etc., v. Walker, 107 Ill. 540, 47 Am. Rep. 467.

"It is provided in Civ. Code, § 1559: 'A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.' The agreement to pay plaintiff was made expressly for his benefit. It has never been rescinded. In such cases the rule is that the party for whose benefit the contract or promise is made may maintain an action against the promisor. Morgan v. Overman S. M. Co., 37 Cal. 537; Flint v. Cadenasso, 64 Cal. 83, 28 Pac. 62; Buckley v. Gray, 110 Cal. 339, 42 Pac. 900; 31 L. R. A. 862, 52 Am. St. Rep. 88; Brewer v. Dyer, 7 Cush. 337. In the latter case the doctrine is thus clearly stated: 'Upon the principle of law long recognized and clearly established, that where one person, for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement * * * that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, establishes a privity, and implies the

promise and obligation on which the action is founded."

In the present case it is explicitly averred in the replication, e. g. in paragraph I, subdivision c, Transcript page 115, and is consequently admitted by the motion for judgment on the pleadings, that the obligations assumed by defendant in error under and in pursuance of the aforesaid transaction of March 14, 1910, between herself and Mrs. Mary M. Smith, were never waived, set aside, or rescinded by the parties thereto. It follows, then, that said section 4970 of the Montana Revised Codes is fully applicable in the present controversy.

Further, we call attention to the luminous opinion of Tweeddale v. Tweeddale (Wis.) 61 L. R. A. 509, 512, decided in 1903, for in that case some of the facts here presented are found. We quote a part of the decision in that case:

> "Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that

the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former, and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one or both of such parties can thereafter change the situation as regards the third person without his consent."

And see Grimes v. Barndollar (Colo.) 148 Pac. at page 261, together with the many cases there cited.

V.

That by the said deed, and the accompanying paper, a voluntary trust was created, we submit, is self-evident. The Montana statute, Rev. Codes § 5365, defines a voluntary trust as follows:

"A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another."

See also sections 5367, 5368, 5369, 5370, 5371.

And see:

Grant v. Bell, 58 Atl. 951 and cases cited.

Chadwick v. Chadwick, 59 Mich. 87; 26 N. W. 288.

"It requies no particular form of words to cre-

ate a trust. It will be inferred from the facts and circumstances of each particular case."

Chadwick v. Chadwick, 59 Mich 87.

See also

Padfield v. Padfield, 68 Ill. 210.
Freer v. Lake, 4 N. E. 512.
Cooper v. Whitney, 3 Hill, 96.

"No technical language is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words 'upon trust' or 'trustee,' if the creation of the trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement."

Colton v. Colton, 127 U. S. 300, 310.

And see

Taber v. Bailey (Cal.) 135 Pac. 975.

"The proof of the trust is not necessarily confined to any single writing, but may consist of several papers. Nor is it necessary, in such cases, that all of the writings be signed, provided they are so linked together in meaning as to be understood without the aid of parol evidence. It is not necessary that the writing re-

lied upon to prove the trust should be contemporaneous with the creation of the trust."

Jones on Evidence § 419, end of section.

Loring v. Palmer, 118 U. S. 321.

9 Pom. Eq. § 1007.

And in 1 Lewin on Trusts p. 130 (No. 1), it is said:

"Wherever a person, having the power of disposition over property manifests any intention with respect to it in favor of another party, the court * * * will execute that intention, through the medium of a trust, however informal the language in which it happens to be expressed."

A grant with a condition is viewed as a trust and is enforceable in equity.

1 Lewin Trusts p. 140 (No. 18).

And see the well reasoned case of Mills v. Davison (N. J.) 35 L. R. A. 113, 116.

Nor is a consideration necessary to uphold a trust.

Taber v. Bailey (Cal.) 135 Pac. 975, 978.

"The defendant cannot be permitted to retain possession as a trustee after repudiating his trust and claiming adversely. To permit such a course would be inequitable and an encouragement to fraud. By such a rule, the trustee could remain in possession by virtue of his office, and at the same time claim adversely until his claim ripened into a title under the statute of limitations."

Schlessinger v. Mallard, 70 Cal. 326.

and in Montana Rev. Codes § 5406, which is the same as Calif. C. Code § 2280, it is provided:

> "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

It is wholly immaterial what the transaction in question is called. Whether a trust, a gift in trust, a gift, a conveyance on condition subsequent, or a promise for the benefit of plaintiff in error, the foregoing authorities demonstrate, we submit, the right of plaintiff in error to recover for its breach, a conclusion, too, in accordance with common sense, which after all is the essence of the law, and with axiomatic principles which may not be violated with impunity. The defendant in error would possibly be in position to escape further liability to plaintiff in error by surrendering title to the property encumbered with the burden, but it is not shown that she has evinced any such intention. As long as she retains the property it self-evidently, we submit, must be with the burden her title thereto is charged with, Mont. Rev. Stat. § 6189, and she cannot take advantage of her own wrong. Ibid § 6185.

VI.

The learned judge of the lower court, judging from his memorandum opinion, in passing on the demurrer to and the motion to strike out certain portions of

the then answer of defendant in error, which answer must now be regarded as abandoned by reason of the motion for judgment on the pleadings (Memo. Op. Trans. pp. 112-113), and his subsequent opinion on sustaining said motion (Trans. p. 135), seemed to be of the opinion that the transaction in question constituted a conveyance on condition subsequent, and that the complaint of plaintiff in error is barren of facts sufficient to constitute a cause of action, cannot be amended, and that she, plaintiff in error, has no right capable of enforcement. This, of course, is the vital question for consideration and determination by this court. It is raised in Nos. 5, 6, 7, 8 and 9 of the Specifications of Error, *supra.*

By entering into the transaction of March 14, 1910, between Mrs. Mary Smith and defendant in error, and the execution of the papers in evidence of the same, viz, the said deed, Exhibit "A" of the complaint, from Mrs. Smith to the defendant in error, and the accompanying, contemporaneous written agreement between those ladies, which is set out *in haec verba, supra,* and which, as has been shown above, are to be taken, considered and construed as one instrument, it is clear that Mrs. Smith, the owner and grantor of the property set out in the deed, intended not only to confer an interest in the property on the defendant in error, but also to confer a substantial benefit, viz, Fifty dollars a month on her sister, the plaintiff in error. Both parties so understood the transaction, and by accepting the

deed, it is to be conclusively presumed, we submit, the grantee, defendant in error, agreed to the condition, and became as much bound morally and legally to pay during her retention of the premises the said Fifty dollars a month to Mrs. McNaught, plaintiff in error, as though she had entered into an express written obligation to that effect. Recognizing this obligation, the complaint alleges, and it is admitted that defendant in error paid the Fifty dollars a month until October 14th, 1910, thereby, if there were any ambiguity in the matter, placing a contemporaneous construction on the transaction, and what was intended by the parties thereby which is unescapable. What reason the defendant in error may have had for further non-performance on her part of this obligation is immaterial unless Mrs. McNaught, the plaintiff in error, consented to or acquiesced in it. This the plaintiff in error did not do, as is admitted, and, indeed, appears by the institution of the present action. The character of the transaction, its binding force and effect on the defendant in error appears further from the complaint in that it sets forth, Transcript page 3, lines 16-19,

> "that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract."

and further in paragraph 3 on page 3 the papers

> "were delivered and the defendant in pursuance thereof entered into the possession and

enjoyment of said premises, and since then has continued and is now in such enjoyment and possession."

The Supreme Court of Montana in Smith vs. Hoffman *supra* did not decide, nor is it the law that the beneficiary mentioned in the transaction, Mrs. McNaught, the plaintiff in error, had no standing to enforce her rights in the event that she was deprived of them, and this is so whether a trust was created by the transaction in question, or whether the deed be regarded as a conveyance on condition subsequent, or in any other light, for certainly by the transaction in question a right was conferred on the plaintiff in error; she became entitled to it; a deprivation of such right constitutes a wrong, and it is axiomatic that "For every wrong there is a remedy," Montana Rev. Codes § 6191. Now, what is the remedy? We suggested, *supra*, that the transaction in question constituted a trust, and in that regard the quoted passage from *Colton vs. Colton*, 127 U. S. 300, 310, we submit, is unanswerable; and further, we suggested that a grant on condition is viewed and enforced as a trust. An elementary principle of the law is that the beneficiary of a trust may hold a recalcitrant trustee personally liable.

26 Ruling Case Law: Trusts § 215 and note 3 on p. 1350.

Oliver v. Piatt, 3 How. (U. S.) 396, 401.

Lathrop v. Bampton, 31 Cal. 23, s. c. 89 Am. Dec. 144-5

where the court says:

> "Where a trustee, in violation of his trust, invests the trust property or its proceeds in any other property, the *cestui que trust* may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him, for the breach of the trust. The former he can do, however, only when he can follow and identify the property, either in its original or substituted form, as we have already seen. If this cannot be done, the right of the *cestui que trust* to elect is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee; and such seems to be the condition of the *cestui que trust* in the present case. When thus forced to rely upon the personal liability of the trustee, a *cestui que trust* occupies a position towards the estate of the trustee which is not better, but is identical with that of a simple contract creditor. He has no special lien upon the general estate of the trustee which is superior to that of any other creditor, for the specific property covered by the trust is gone, and nothing is left to the *cestui que trust* except a naked claim for damages generally on account of the breach to be obtained through an action at law, attended by all the incidents of a like action on behalf of one who is not the beneficiary of a trust."

And in the footnote 89 Am. Dec. p. 147 it is said:

"UPON BREACH OF TRUST BY TRUSTEE, CESTUI QUE TRUST MAY HOLD TRUSTEE PERSONALLY LIABLE or follow the property; Huckabee v. Billingsby, 50 Am. Dec. 183; Kaufman v. Crawford, 42 Id. 323;"

and Glendenning v. Slayton, 55 Mont. 587, where the syllabus reads:

"A bank which accepts a deposit of money in trust for the benefit of another, to be delivered to a third party upon the happening of a contingency, is bound to the highest good faith in executing the trust thus created; disposition of the deposit contrary to instructions renders the bank liable in damages either for a conversion, or in *assumpsit* for money had and received."

The reason for this rule is manifest, as without the capacity to enforce his rights it is easily conceivable that a beneficiary of a transaction, e. g. by connivance between trustor and trustee, would be without remedy, and that the rule applies in such cases as the present one is axiomatic, for, "When the reason is the same the rule is the same." Mont. Rev. Codes § 6179.

See Potter v. Lohsee, 31 Mont. on p. 96.

An illuminative case in this regard is that of Gall v. Gall, 5 L. R. A. (NS) 603, 605, which is cited and quoted from with approval in Smith v. Hoffman *supra.* In that case a conveyance on condition subsequent to support, the grantor being also the beneficiary of the condition, was under consideration, and it was held not only that such beneficiary had the right to sue

and recover at law for prior breaches of the condition, but also might sue to rescind because of subsequent breaches, such breaches constituting separate causes of action (p. 605). For ready reference we quote from the syllabus:

> "It is insisted, however, that the commencement of the action at law in December, 1901, to recover damages on account of failure to make payments annually as agreed prior to December, 1901, and the prosecution of such action to judgment by plaintiff, as well as the receipt by her of payments under the contract subsequent to December, 1901, amounted to an election of remedies by plaintiff; and that she could not thereafter maintain a suit in equity to rescind the contract. The action at law, commenced in December, 1901, was for prior breaches on account of failure to make annual payments in money and property as provided in the contract for the support and maintenance of the plaintiff. Such breaches constituted a separate cause of action. The action at law which went to judgment in favor of the plaintiff, and which was affirmed by this court (120 Wis. 270, 97 N. W. 938), covered breaches prior to the commencement thereof, and for such the plaintiff had the right to rescind or sue for damages. She had the same right of redress for subsequent breaches."

In a former part of this brief we said that the law is that by the acceptance of the deed with the con-

dition in question it is to be conclusively presumed that the defendant agreed to and became bound to fulfill the condition. We are surprised that this should be questioned, but, however that may be, we submit that the law is as stated by us. Thus in a leading work, 2 Devlin on Real Estate (3rd Ed.) section 940a, page 1758, it is said:

> "After acceptance of the deed by the grantee, and entry into possession of the land conveyed, he is bound as effectually by the conditions contained in the deed as though he had signed and executed the deed himself. He is deemed by such acts to have expressly agreed to do what it is stipulated in the deed that he shall do. Whether or not such an obligation is to be deemed, technically speaking, a covenant running with the land, it is, at all events, an agreement on the part of the grantee evidenced by his acceptance of the deed."

and in the same section on page 1759 it is said:

> "The acceptance of the deed constitutes a contract and all the covenants bind the grantee and his successors."

and further on pages 1759, 1760:

> "The acceptance of the deed implies an undertaking on the part of the grantee to perform the condition, and a subsequent grantee is equally bound. The acceptance of a deed poll makes it the mutual act of the parties. In some States the technical rule prevails that an agreement not

> sealed by the party charged with performance cannot create a covenant running with the land, but it is to be regarded as the personal agreement of the grantee. But if an action cannot be maintained on the deed, assumpsit will lie."

In support of these principles, so clearly announced, the author cites a wealth of modern authorities in footnotes appended to the text which it would smack of pedantry for us to review. It seems monstrous to us to claim that one may knowingly accept a conveyance founded on the sole consideration of paying a small sum of money to another, to endeavor to escape from such payment *while still retaining the benefit* of the conveyance. To sustain this contention, we submit, would violate at least two maxims of the law, viz: "He who takes the benefit, must bear the burden." Mont. Rev. Codes § 6189, and "No one can take advantage of his own wrong." Ibid § 6185.

Of course, the plaintiff in error, who is the one entitled to the benefit, is the "real party in interest" to enforce the right under Mont. Rev. Codes § 6477. And it cannot, we submit, be contended that whatever Mrs. Smith may have done, which might affect her rights can possibly prejudice Mrs. McNaught, unless she consented to or acquiesced therein, for again, a maxim of the law is applicable: "No one should suffer for the act of another," Mont. Rev. Codes § 6188, and this, we submit, is what the supreme court of Montana had in mind when it said in Smith v. Hoffman *supra*, on page 319:

"It would certainly be unjust to penalize defendant for the non-performance of that which the plaintiff herself had said she would excuse. Certainly, *so far as this action is concerned defendant had the right to rely on these statements.* (Italics ours).

and on the same page:

"The point is made that the letters, in order to be binding or cognizable at law or in equity, must be founded upon a consideration, or the promises or agreements therein must have been fully executed. This is not an action in damages. *Whether the letters release defendant from damages because of her failure to make the payments in question is not a matter to be passed upon here. In a proceeding involving that question, the effect of letters or promises not based upon a consideration might perhaps be considered.*" (Italics ours).

See in this connection Transcript page 115, subd. c.

It is submitted, "that tried both by the square of principle and the plumb line of authority" (6 Mont. 532) the complaint in the present action is not vulnerable to a general demurrer, and the opinions of the lower court in that regard are erroneous.

In its memorandum opinion the lower court attempted to align itself with the said case of Smith v. Hoffman, 56 Mont. 299, in holding that the said deed and contemporaneous agreement between Mary M.

Smith and defendant in error constitute a conveyance from the former to the latter on condition subsequent. In such memorandum opinion the lower court says: (Trans. p. 112, 113):

> "No intent to create a trust or gift in trust appears, for the payments to plaintiff are not charged upon the body or rents of the property involved, *and on the whole are optional with defendant.* No covenant is indicated beyond that implied from the language that, by defendant, "Not less than $50 per mo. be paid to" plaintiff "for an unlimited time and the deed will then stand good until" defendant's marriage or death, reversion to the grantor Smith or heirs. *Therein defendant does not covenant to pay in any event, but only to pay so long as she elects to hold the property secure from re-entry by Smith or heirs. If defendant fails to pay, she is not subject to suit for damages or to compel payment by even Smith or heirs, much less by plaintiff.*
>
> "In such contingency defendant is only liable to divestiture of her estate in the property, if Smith or heirs elect to take advantage of defendants' breach, and re-enter upon the property.
>
> "The language of the agreement involved, crudely sets forth that the payments to plaintiff are of a condition subsequent. If made "the deed then will stand good." If not made, the deed will no longer "stand good," and the property reverts to Smith or heirs—*if they do not choose to re-*

enter, but waive the breach, plaintiff cannot take advantage of the breach, and all this is "horn book" law." (Italics ours).

We submit there is here contained a manifest misconception of the law. There can be no room for serious dispute that the acceptance of a deed on condition subsequent and the entering into possession of the granted premises thereunder by the grantee, all of which is admitted in the present case, raises a promise or undertaking on the part of the grantee to comply with the conditions, the fulfillment of which is not optional with the grantee but is binding on and enforceable against him. We have found, after a diligent research, no authorities to the contrary of this principle, and many in support of it. See authorities cited in this brief *supra.*

In a case from this circuit, United States v. Stanford, 69 Fed. 25, *loc. cit.* p. 38, in which the land grant from Congress to the Central Pacific R. R. Co. was considered, the court, Ross, Circuit Judge, said:

> "The terms and conditions of those grants are to be ascertained by resort to the statute. Having been duly accepted by the railroad companies in question, they constitute the contract between the respective parties, from which the companies cannot depart, and which the government cannot change or alter except in the mode reserved to it by law. If upon so elementary a proposition, authority is needed, it may be found in the decision

in the Sinking Fund Cases 99 U. S. 718, 719, and in Union Pac. R. C. v. U. S. 104 U. S. 662."

It should be observed that in this last cited case, which was one seeking to charge a *stockholder* of the accepting corporations for a proportionate amount of their debts to the United States, it was decided, on obvious grounds, that such *stockholder* was not liable for such debts, the above quoted passage being cited by us only as an opinion by one of the judges of this circuit on the point now under consideration.

In the much cited case of Hickey v. Lake S. & M. S. R. Co. (51 Ohio St.) 23 L. R. A. 396, a condition in a conveyance that the grantee should build and maintain fences on each side of the grantor's right of way was considered. The grantee subsequently conveyed the granted premises in divers parcels to sundry persons, who did not maintain the fences. The railway company did so build and maintain them, and for the cost thereof sued the grantee. The court said:

"Where a grantee accepts a deed, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land,

is, nevertheless, an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and by express words, his heirs and assigns.

"In *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633, it was held that a clause in a deed poll, to the effect that the grantee agrees for herself and for her heirs and assigns, that she and they would forever make and maintain a fence all around the granted premises, was of the same effect as an express covenant, signed and sealed by the grantee; that it would run with the land; that it created an incumbrance upon the land; and, by implication, it was recognized that a subsequent grantee would be liable to the original grantor in an action of assumpsit for nonperformance of the stipulation. A decision substantially similar was rendered in *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 450.

"And, in *Georgia Southern Railroad v. Reeves*, 64 Ga. 492, the grantor in consideration of $25, and of the building of the railroad, conveyed to a company, its successors or assigns, forever, in fee simple, the right of way through his land, and added in the deed the words: "It is hereby agreed and understood a depot and station is to be located and given to said Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Reeves and his assigns, and to be used for the general purposes of

the railroad company." It was held that the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser, under proper legal direction, of the rights, privileges, franchises, and property of the former. See also *Countryman v. Deck,* 13 Abb. N. C. 110."

In Sexauer v. Wilson, decided in 1907, 14 L. R. A. (N. S.) 185, 193, which involved the question of the *personal liability* of the grantee and his grantee for the non-performance of a condition subsequent to build and maintain a fence, a judgment against the grantor's grantee was held improper, but a judgment was ordered against such grantee's grantee. The court said:

"No question is made but that acceptance of the deed by the grantee obligated him to perform the conditions of the covenant. There is a sharp conflict in the decisions, but this court appears to be committed to the doctrine that, in accepting a deed poll containing covenants or conditions to be performed by him in consideration of the grant, he becomes bound for their performance. Peden v. Chicago, R. I. and P. R. Co. and Kennedy Bros. v. Iowa State Ins. Co. supra. And such is the voice of the great weight of authority. Hickey v. Lake Shore & M. S. R. Co. 23 L. R. A. 396, and note (51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672); Georgia Southern R. Co. v.

Reeves, 64 Ga. 492; Burbank v. Pillsbury, supra; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Maynard v. Moore, 76 N. C. 158; Midland R. Co. v. Fisher, supra; decisions collected in 11 Cyc. Law & Proc. p. 1045. The doctrine is an ancient one, being laid down in Sheppard's Touchstone, p. 117, as follows: "If feoffment or lease be made to two, * * * and there are divers covenants in the deed to be performed on the part of the feofees or lessees, and one of them doth not seal, * * * and he that doth not seal notwithstanding accept of the estate, and occupy the land conveyed or demised, in these cases, as touching all inherent covenants, * * * they are bound by these covenants as much as if they do seal the deed."

A particularly strong and apt case is that of Gall v. Gall, 126 Wis. 390, 5 L. R. A. (NS) 603, cited with approval in Smith v. Hoffman, 56 Mont. 315, and which constitutes one of the chief cases on which the Montana Supreme Court bases its reasons for this latter decision. In said case (Gall v. Gall) there was a conveyance on condition subsequent for the support, etc., of the grantor. The condition was broken whereupon the grantor began suit for the moneys then due on the condition subsequent and recovered judgment. Afterwards because of further breaches which occurred subsequent to the recovery of said judgment the grantor sued to rescind the contract and recovered judgment. It will be noticed that here the

plaintiff was both grantor and beneficiary in and under the deed. The judgment was affirmed. The syllabus reads:

> "Enforcement, by action, of benefits due under a contract by which property is conveyed in consideration of support, does not preclude, on the theory of election of remedies, an action to rescind the contract for subsequent breaches.
>
> "That at the time an action is brought for the benefits due under a contract for support in consideration of the conveyance of property, breaches exist subsequent to those included in the action; and that, after recovery, plaintiff accepts benefits which have so accrued, do not preclude an action, based on still later breaches, for a cancellation of the contract."

In the opinion it is said, page 605:

> "The conveyance of the premises in question by plaintiff to defendant Charles Gall, in consideration of support, maintenance, medical treatment, good care, and a home upon the premises conveyed, created an estate upon condition subsequent, subject to be defeated upon the nonperformance of such condition. Glocke v. Glocke, 113 Wis. 303, 57 L. R. A. 458, 89 N. W. 118. This doctrine is well established by the authorities, and not seriously disputed by counsel for appellant. It is insisted, however, that the commencement of the action at law in December,

1901, to recover damages on account of failure to make payments annually as agreed prior to December, 1901, and the prosecution of such action to judgment by plaintiff, as well as the receipt by her of payments under the contract subsequent to December, 1901, amounted to an election of remedies by plaintiff; and that she could not thereafter maintain a suit in equity to rescind the contract. The action at law, commenced in December, 1901, was for prior breaches on account of failure to make annual payments in money and property as provided in the contract for the support and maintenance of the plaintiff. Such breaches constituted a separate cause of action. *The action at law which went to judgment in favor of the plaintiff, and which was affirmed by this court* (120 *Wis.* 270, 97 *N. W.* 938), *covered breaches prior to the commencement thereof, and for such the plaintiff had the right to rescind or sue for damages. She had the same right of redress for subsequent breaches. The fact that she was compelled to sue for the recovery of annual installments falling due before December, 1901, affords no grounds for holding that for subsequent breaches she could not rescind.* The doctrine of election of remedies prohibits one from intentionally taking different and inconsistent positions to the detriment of his adversary. 2 Van Fleet, Former Adjudication, § 436. The subject has been often and fully discussed by this court." (Italics ours).

In Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765, 769, opinion by Brewer, Judge, it is said:

> "Still further we remark, that the acceptance of a deed which in terms provides that the grantee shall pay off a certain incumbrance, is an undertaking by the grantee to pay the incumbrance, and an undertaking which may be appropriated by the holder of the incumbrance, and upon which he may maintain an action. *Corbett v. Waterman*, 11 Iowa, 87; *Bowen v. Kurtz*, 37 id. 240; *Ross v. Kinnison*, 38 id. 397; *Lawrence v. Fox*, 20 N. Y. 268; *Thorp v. Keokuk Coal Co.* 48 Iowa, 253; *Burr, Admx. v. Beers*, 24 N. Y. 178. The rule is thus stated by the assistant vice-chancellor in *Blyer v. Monholland*, 2 Sandf. Ch. 478: 'The obligation is not enforced as being made by Monhollands to the complainant for the payment of Fitzrandolph's debt, but as a promise by M. to Fitzrandolph to pay him $2,500 by paying that sum to the complainant in discharge of his debt, which promise the complainant, as the mortgage-creditor of Fitzrandolph, is equitably entitled to lay hold of and enforce.' And the law courts have since then held that a legal action might be maintained by the holder of the security. *Lawrence v. Fox*, 20 N. Y. 268; *Anthony v. Herman*, 14 Kans. 494. Such an undertaking is a contract in writing, and the statute of limitations does not begin to run upon such a contract until the execution of the deed. Nor is it

material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in writing signed by only the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee."

Shover v. Myrick, 30 N. E. 207, is also an apt case. There a mother deeded to a daughter property on condition or agreement that the latter should support the former during life. The daughter died during the lifetime of the mother, and the latter's support was discontinued. She thereupon filed a claim for the value of such support against the deceased daughter's estate. It was allowed and the administrator appealed. In the opinion it is said:

"When the decedent entered into the agreement, and received from her mother the conveyance of the land, she accepted the terms thereof, including both that which was beneficial and that which was burdensome. Her contract to support and care for the appellee was a continuing one, and, upon a breach thereof, the latter had a right to recover full and final damages, including the entire expense for such support and care, not only to the time of the commencement of the action, but during the remainder of her life. Schnell v. Plumb, 55 N. Y. 592. This must be true whether the breach arose from some cause during

the life of the decedent, or because of her death. In the latter case the remedy is, of course, against her estate. The measure of damages for such breach is the value of the support and care from the time of the breach."

In Gardner v. Frederick (Wash. 1917) 165 Pac. 85, 86, the court said:

"The rule in this state, as well as the great weight of authority, is to the effect that, where an aged parent conveys property to a son or daughter, or other person, in consideration of future support and care, and there is a willful and wrongful withholding of such support and care, in equity the contract may be rescinded, or, if rescission cannot be had, an action for damages will lie. Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629; Gustin v. Crockett, 51 Wash. 67, 97 Pac. 1091; Hewett v. Dole, 69 Wash. 163, 124 Pac. 374; Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768; Bogie v. Bogie, 41 Wis. 209; Davis v. Davis, 135 Ga. 116, 69 S. E. 172; Carpenter v. Carpenter, 66 Hun (N. Y.) 177, 20 N. Y. Supp. 928; Shover, Administrator, et al, v. Myrick, 4 Ind. App. 7, 30 N. E. 207.

"In this case rescission could not be had because a portion of the land prior to the institution of the action had been sold and conveyed by the appellants to a third person. Under the authorities cited the action for damages could be maintained, if there was a willful and wrongful re-

fusal to provide the care and support contracted for, even though at the time the promise was made there was not then, in the minds of the appellants, an intention not to perform it."

In 11 Cyc. p. 1045 the rule is stated:

"The acceptance of a deed, whether poll or *inter partes*, containing a covenant on the part of the grantee is equivalent to an agreement on his part to perform the same, and it is immaterial that the deed is not signed by him. As to the nature of his liability, however, whether as upon an express covenant, or as upon an implied undertaking, the courts are utterly at variance."

In a footnote to 15 Annoted Cases on page 683 we find the following:

"By the acceptance by a grantee of a deed poll containing stipulation for the payment of money or the performance of any other act for the benefit of the grantor, a contractual obligation arises which is enforceable, at least between the parties. But as the grantee has not executed the deed, an action of covenant cannot, where the old forms of action prevail, be maintained for the breach or the non-performance of such contract.

England. Burnett v. Lynch, 5 B. & C. 589, 12 E. C. L. 327, *distinguishing* statement in Co. Litt, 231a. See also Lock v. Wright, 1 Stra. 571.

Canada. Credit Foncier France-Canadian v. Lawrie, 27 Ont. 498.

United States. See Willard v. Wood, 135 U. S. 309, 10 S. Ct. 831, 34 U. S. (L. ed.) 210, affirming 4 Mackey (D. C.) 538; Sanger v. Upton, 13 Nat. Bankr. Reg. 226.

Connecticut. Elting v. Clinton Mills Co. 36 Conn. 296; Foster v. Atwater, 42 Conn. 244.

See also Hinsdale v. Humphrey, 15 Conn. 431.

Maryland. See Stabler v. Cowman, 7 Gill & J. 284; Western Maryland R. Co. v. Orendorff, 37 Md. 334. See also State v. Humbird, 54 Md. 327.

Massachusetts. Pike v. Brown, 7 Cush. 133; Braman v. Dowse, 12 Cush. 227; Newell v. Hill, 2 Met. 180; Guild v. Leonard, 18 Pick 511; Goodwin v. Gilbert, 9 Mass. 510; Maine v. Cumston, 98 Mass. 317; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Kennedy v. Owen, 136 Mass. 199. See also Nugent v. Riley, 1 Met. 117, 35 Am. Dec. 355; Phelps v. Townsend, 8 Pick. 392; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335. *Compare* Fleming v. Cohen, 186 Mass. 323, 71 N. E. 563, wherein it is said: "A deed poll being given by one and accepted by the other was as effectual as if a formal indenture had been signed."

New Hampshire. See Emerson v. Mooney, 50 N. H. 315; Harriman v. Park, 55 N. H. 471; Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633.

Oregon. Weaver v. Southern Oregon Co. 31 Ore. 14, 48 Pac. 171.

Pennsylvania. Maule v. Weaver, 7 Pa. St. 329, per Gibson J. See also Shoenberger v. Hay, 40 Pa. St. 132. *Compare* Louer v. Hummel, 21 21 Pa. St. 450, construing act of April 25, 1850; Kelly v. Nypano R. Co. 23 Pa. Co. Ct. 177.

Rhode Island. See Urquhart v. Brayton, 12 R. I. 169.

South Carolina. Giles v. Pratt, 2 Hill L. 439.

Vermont. Johnson v. Muzzy, 45 Vt. 419, 12 Am. Rep. 214. *Compare* Kellogg v. Robinson 6 Vt. 276, 27 Am. Dec. 550.

West Virginia. West Virginia, etc. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696.

Virginia. Vanmeter v. Vanmeter, 3 Gratt. 148."

In the present case the old technical rule that the action of covenant would not lie unless the defendant signed and sealed the deed does not apply, for here defendant in error did sign it by signing that part of it designated as the accompanying or contemporaneous agreement, and in Montana all distinctions between sealed and unsealed instruments are abolished. Mont. Rev. Codes § 5022, as in California (Cal. C. C. § 1629). The foregoing states the rule derivable from the acceptance, only, of a deed containing conditions or covenants, and *a fortiori* is this the case where the grantee signs the deed, or a part of it, as here. But

let us see whether in the present instance there is not an express agreement on the part of Mrs. Hoffman, the grantee, defendant in error, to pay the $50 in question.

In its memorandum opinion the lower court says:

> "The payments to plaintiff are not charged upon the body or rents of the property involved, *and on the whole are optional with defendant. No covenant is indicated beyond that implied from the language that by defendant not less than* $50 *per mo. be paid to plaintiff," etc.* (Italics ours).

This, too, we submit, is erroneous. It is a familiar, elementary rule of construction that all words in a contract must be considered; it must be read from its four corners. Further, "the intention of the parties is to be pursued if possible," and by Mont. Rev. Codes § 7877:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Construed in Parham v. Chicago &c R. Co. 57 Mont. on page 502, and, as well said in this circuit by Sawyer, Judge, in Pratt v. California M. Co. 24 Fed. *loc. cit.* p. 872:

> "It is permissible for the court to take into

consideration the contemporaneous and subsequent action of these various parties in reference to this property, as evincing their construction and understanding of their respective rights and interests under this deed executed by Walsh to this association. *Mulford v. Le Franc*, 26 Cal. 88; *Steinbach v. Stewart*, 11 Wall. 576; *Hamm v. City of San Francisco*, 9 Sawy, 31; S. C. 17 Fed. Rep. 119."

And see

Helena &c Co. v. N. P. R. Co. 57 Mont. on page 106.

Blinn v. Hutterische Soc. &c (Mont.) 194 Pac. on page 142.

Now applying these rules, the pleadings and motion admit: That Mary M. Smith was the owner of the property referred to; that plaintiff in error was her sister; that she desired to make some provision for her; that a contract was entered into between her and defendant in error that no less than $50 per month was to be paid to such sister; that the conveyance from Mrs. Smith to defendant in error was voluntary, i. e. without other consideration than the carrying out of this arrangement; and that such payments were made by defendant in error until October 14, 1910. The $50 was to be paid by somebody. It clearly was not to be paid by Mrs. Smith, so whatever ambiguity exists, and we submit there is none, as to who was to make these payments is resolved by the action of

defendant in error herself in making the payments until October 14, 1910. Here, we submit, is a perfectly clear meeting of minds, and therefore, as it is admitted by the pleadings and motion, being founded on a valuable consideration, it should be given effect.

Another erroneous construction lurks in such memorandum opinion, viz:

> "Therein defendant does not covenant to pay in any event, but only to pay so long as she elects to hold the property secure from re-entry by Smith or heirs. If defendant fails to pay, she is not subject to suit for damages or to compel payment by even Smith or heirs, much less by plaintiff."

for

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Mont. Rev. Codes § 7875).

and we can find no warrant either in the agreement, or in the pleadings, or in the law, for this deduction of the lower court. Possibly, it should be remarked that we do not contend that the State statutes concerning construction of instruments control the Federal courts, we cite them for convenience sake, and be-

cause as has been well said "They constitute a perfect echo of the common law."

Having, then, a contract between Mrs. Smith and defendant in error for the benefit of plaintiff in error; one that had become executed insofar as its nature permitted of (See Lewis v. Lanebros (Mont.) 194 Pac. 152) it was irrevocable without the consent of plaintiff in error which the pleadings and motion admit and show was never given, so the only possible question remaining is whether plaintiff in error is the proper party to sue for its breach. This, we submit, must be answered in the affirmative both by reason of Mont. Rev. Codes § 6477 which provides that "every action must be prosecuted in the name of the real party in interest;" and Section 4970, which reads:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

And see 9 Cyc. pp. 378-385.

For these reasons, it is respectfully submitted that the judgment of the lower court is erroneous and wrong, and inasmuch as all the facts are admitted, that this court should render judgment in favor of plaintiff in error as prayed for in the complaint herein, or that it should order the lower court so to do.

McINTIRE AND MURPHY,
Attorneys for Plaintiff in Error.

H. G. McINTIRE
Of Counsel.

No. 3659

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLLIE N. McNAUGHT,
Plaintiff in Error,

vs.

SADIE HOFFMAN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

GUNN, RASCH & HALL
BELDEN & DeKALB,
Attorneys for Defendant in Error.

ARGUS JOB ROOMS, LEWISTOWN, MONT.

No.....

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BRIEF OF DEFENDANT IN ERROR ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

BRIEF AND ARGUMENT.

I.

The discussion revolves around the main question, does the complaint state a cause of action in favor of the plaintiff and against the defendant? The plaintiff in error has taken the position that the memorandum, held by the Montana Supreme Court in Smith vs. Hoffman, 56 Mont., 315, to be a condition subsequent annexed to the deed from Mrs. Smith to Mrs. Hoffman, should be construed as a trust. Her principal argument seems to be addressed to this contention. It is also suggested that the writings may be regarded as a gift, a contract made for the benefit of a third person, or a conveyance on conditions subsequent, as was held by the Montana Court, supra.

THEORY UPON WHICH CASE PRESENTED.

At the outset we respectfully submit that the character of the instruments and of the transaction were fully discussed to and determined by the Supreme Court of Montana in Smith vs. Hoffman, supra. Learned counsel for plaintiff in error made to the Montana Court essentially the same contentions as are made herein, with special stress being laid upon the argument that the memorandum in question operated as a condition subsequent; thus, we quote from the resume of the brief of counsel for the appellant

in that case as it is found preceding the opinion in Smith vs. Hoffman, supra:

First: "By the two instruments, a transfer upon condition precedent was effected, the condition being the continued payments of $50.00 per month for an unlimited time, that is, for a length of time without restrictions or bounds," etc. * * *

Second: "If the result reached in the construction of this transaction is adverse to its being a conveyance on condition precedent, the query then arises whether the continued payment of $50.00 per month is not a condition subsequent, within the meaning of Section 4902 Revised Codes", etc. * * *

Third: "By the two papers an implied trust was created".

MONTANA DECISION CONTROLLING.

We contend that the construction of the two instruments by the Supreme Court of Montana is not only correct but may reasonably be said to be res adjudicata. This matter would seem to be placed beyond controversy by what is said in subdivision II, page 9 of the brief of plaintiff in error as follows:

"The plaintiff in error was not made a party to said action but we do not think it out of place to advert to the fact that there was an express finding of fact therein that

she knew of and consented to the bringing and maintenance of said action".

We are equally confident that it is not out of place for us to mention the fact that this was also conceded at the trial in the local State District Court in the case of Smith vs: Hoffman, supra. But we further submit that the decision in the case of Smith vs. Hoffman is one establishing a rule of local law with regard to real property, and that the construction of the instrument will be followed by this Honorable Court. The rule is laid down succinctly in:

27 R. C. L., page 51 Section 57.

In any event if the "decisions are not controlling, they are persuasive and will receive attention and respect".—27. R. C. L. page 53—Section 58.

Also as authority on this point see:

Guernsey vs. Imperial Bank, 188 Fed. 300, 119 C. C. A. 278, 40 L. R. A. (N. S.) 377; Newbern vs. National Bank, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917 B, 1019; Swift vs. Tyson 16 Pet. 1, 10, U. S. (L. Ed.) 865.

That a rule of property was laid down and local statutes construed cannot be denied.

The Supreme Court in the Smith-Hoffman controversy applying the provisions of Section 4623 Revised Codes of Montana reading as follaws:

"When a grant is made upon condition

> subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must re-convey the property to the grantor or his successors by grant, duly acknowledged for record,"

said:

> "Under all the circumstances and the weight of authority, we deem the deed to have been made upon a condition subsequent imposed by the memorandum and contract, and that upon a breach of such condition the plaintiff would become entitled to a rescission or cancellation, unless there was a waiver of the condition",

It was held that there had been a waiver of the condition. The point we wish to make is that the Court determined as a rule of property that a deed with a defeasance of this general character constituted a deed with a condition subsequent appended thereto, and that rule of property is now res adjudicata.

The transaction, therefore, upon which the plaintiff now relies in the pending case, was, according to the intention and understanding of Mrs. Smith, the grantor, as evidenced by the position taken by her in her own action against the defendant in error, a conveyance upon condition vitiating the grant for non-performance: and, as determined by the State Court, a conveyance upon condition subsequent, terminat-

ing the estate granted, upon its breach, which would have entitled the grantor to a rescission of the contract and a cancellation of the deed, if performance had not been waived. Whether Mrs. Smith was also precluded from recovering damages, by the defendant's failure to make the payments in question, was not a matter to be passed upon in that case. Whatever benefits therefore, the memorandum contract conferred upon Mrs. McNaught, were taken subject to the right of Mrs. Hoffman, the defendant in error here, to relieve herself of the obligations which the conditions of the memorandum contract imposed, if, under the terms of that instrument, the exercise of that right was left open and available to her. And the fact that Mrs. Smith, the party to the contract who would have been entitled to avail herself of the remedies which a breach of the conditions conferred has estopped herself from enforcing the penalties of the breach, does not change or affect the legal relations between the plaintiff and the defendant in the case at bar.

II.

In the brief submitted by the learned counsel for the plaintiff, he invokes, as determinative here, the law laid down by the Supreme Court of the State in Smith vs. Hoffman, stating that, while the present plaintiff was not in express terms a party to that action, "there was an express finding of fact therein that she knew of

and consented to the bringing and maintenance of said action".

III.

NO CONTRACTUAL DUTIES IMPOSED BY MEMORANDUM.

The memorandum contract imposes no contractual duties or obligations upon anyone. The only terms of a contractual nature are those defining the estate intended to be granted by the fee simple deed from Mrs. Smith to Mrs. Hoffman, to-wit: a life estate; and those imposing the conditions upon which the continuing existence of that life estate should depend, to-wit: the grantee's remaining single and the payment of $50 per month to Mrs. McNaught. Upon a compliance with these conditions, "the deed," in the words of the memorandum contract, "then will stand good" until the grantee's death. It was optional with Mrs. Hoffman to comply, or not to comply, with the conditions imposed, as she might choose or see fit, the failure to comply with either one of the conditions resulting merely in the forfeiture and termination of the life estate. She did not agree or bind herself to keep up these payments indefinitely, any more than that she would remain single the remainder of her life: all that she did agree to was that the estate granted by the fee the simple deed should only be a life estate and that the life estate should come to an end in the event of her failure to abide or com-

be cleared up by pleading
13 C. J. 716.

ply with either one of the conditions of the memorandum contract.

NOT A TRUST.

Hence, aside from the fact that this is not a suit in equity for the establishment and enforcement of a trust, but a common-law action upon an alleged contractual obligation for the payment of money, no trust was created as was suggested. For, as stated by the New York Court of Appeals, in Holland vs. Alcock, 2 Am. St. Rep., on pages 427 to 428:

> "This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. **In such a case there is no trust in the sense in which the term is used in jurisprudence.** There is simply an honorary and imperfect obligation to carry out the wishes of the donor which the alleged trustee cannot be compelled to perform, and which he has no right to perform contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the perform-

ance of which no ascertainable person has any interest, **and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose".**

To the same effect:

24 Ruling Case Law, "Trusts" Par. 20, p. 1184.

See, also:

Mantel vs. White, 47 Mont. 234, 132 Pac. 22.

And in Birdsall vs. Grant, 57 N. Y. S. 705, it was held that a deed conveying the property, subject to the condition of paying the income and profits thereof to the grantee's son during his natural life,

"does not create a trust, but conveys on a condition subsequent, which may be waived by the person entitled to enforce it".

"A trust of this class cannot be established by a transaction which merely creates an equitable lien, mortgage, or other security, or an executory contract to sell or convey. **Neither is a trust created by the fact that part or all of the consideration for an absolute conveyance is a promise by the grantee to pay a certain sum of money to a third person."**

39 Cyc. 65.

The complaint fails to state facts sufficient

to constitute a cause of action, based on any such theory.

One of the allegations of the complaint is: "and plaintiff does aver and allege that no other or further consideration for such deed passed or was given by said defendant than the carrying out and fulfilment of the conditions of such agreement or contract". (Tr. p. 3.)

In Riddle vs. Beattie, 77 Iowa, 168, 41 N. W. 606, when a deed was made in consideration of support of the grantor the court held that no trust arose. The Court said in part:

> "There is no question of trust in the case. The facts alleged in the petition do not establish a trust, arising either between plaintiff and Townsend, or plaintiff and Townsend and defendant. The petition shows that Townsend undertook to support plaintiff, and, in consideration of such agreement, the land was conveyed to him. There is not a word in the petition showing a trust arising in the transaction."

The complaint in this case is not so framed as to support any such theory. It is clear that the memorandum does not create a trust. Neither the property conveyed, nor any specified income therefrom is to be devoted to the support of Mrs. McNaught; nor is there any requirement to account.

Brown vs. Carter, 15 S. E. 935;

Stanley vs. Cobb, 5 Wall, 119, 165, 18 L.

Ed. 502, 509;

Spiers vs. Roberts, 73 Mich. 666, 41 N. W. 841.

ANY TRUST WOULD BE BARRED BY STATUTE OF LIMITATIONS.

If the transaction could be construed to be a trust at all, an action to establish and enforce it would be barred by the statute of limitations. Section 6451 R. C. (518 Code Civ. Proc.) reads as follows:

> An action for relief not hereinbefore provided for, must be commenced within five years after the cause of action shall have accrued".

In Mantell vs. Speculator Mining Co., 27 Mont. 473, it was said:

> "In Lux vs. Haggin, 69 Cal. 255, 10 Pac. 674, the court said: 'It has been repeatedly decided in this state that Section 343 of the Code of Civil Procedure, 'An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued', applies as well to suits in equity as to actions at law'. It will be observed that Section 343 of the California Code of Civil Procedure is, in substance, identical with Section 47 of the Compiled Statutes of 1887 and Section 518 of our Code of Civil Procedure. * * * Under the allegations of the complaint, then, the statute

commenced to run against plaintiff's cause of action in 1893; and, unless the running of the statute was interrupted or suspended, this cause of action, as disclosed by the complaint filed herein, was barred long prior to the date of the commencement of this action, whether Section 47 of the Compiled Statutes, or Section 518 of the Code of Civil Procedude, be applicable in this instance".

See, also:

Boydstun vs. Jacobs, (Nev.) 147 Pac. 447;
Philippi vs. Philippi, 115 U. S. 157, 29 L. ed. 336.

IV.

NOT A GIFT, NOR CONTRACT FOR BENEFIT OF THIRD PERSON.

The requirement of the monthly payments provided for in the memorandum contract being a conditional one, compliance being optional with the defendant, and performance being executory and in **futuro,** there was neither a gift of the money which would have been realized by Mrs. McNaught if the payments had been made, nor was there a contract giving rise to a cause of action in the plaintiff's favor under the provisions of Section 4970 of the Revised Codes, conferring upon a stranger to the contract the right to enforce it when expressly made for his benefit. Section 4970, R. C. provides:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it".

Whatever the rule may be that has been applied to cases of this kind by the courts of other jurisdictions, it is settled law in this State that there is no such right entitling the third party to sue, unless there was, as between the parties to the contract, a legal obligation or duty owing from the promise (in this case Mrs. Smith) to the beneficiary (Mrs. McNaught), which the promissor has promised and undertaken to pay or discharge. This is the New York rule. It was adopted and applied by the Supreme Court of this State in McDonald vs. American Nat'l Bank, 25 Mont. 456, and again in Tatem vs. Eglanol Mining Co., 45 Mont. 367. In the former case, the Court, on pages 494 to 495 of the opinion, said:

> "In so far as they are applicable to the facts of the case at bar, the fundamental principles in the light of which Section 2103 **supra,** should be interpreted may be thus illustrated: An executed contract does not require a consideration to support it. For example, a gift consummated is an executed contract. But a contract of gift the subject of which is not delivered is without consideration—a mere nudum pactum—and therefore not enforceable

by the donee. The provisions of section 2103 do not embrace gifts not perfected or other executory contracts lacking consideration. It should seem to be manifest that the legislature **did not intend to declare that an executory contract in which there is a promise to make a gift or to confer a gratuity upon a third person may be enforced by him.** To come within the meaning and scope of the section, the (executory) contract made expressly for the benefit **of a third person must be one whereby the promissor undertakes to pay or discharge some debt or duty which the promisee owes to the third person,—in other words, the third person must sustain such a relation to the contracting parties that a consideration may be deemed to have passed from him to the promissee which raises the implication of a promise from the promisor directly to himself. There must be a consideration passing from the third person by virtue of which he may assert the existence of a promise in his favor."**

In Vrooman vs. Turner, 69 N. Y. 280, 25 Am. Rep. 195, on page 198, the New York rule was stated in these words:

"The courts are not inclined to extend the doctrine of Lawrence vs. Fox to cases not clearly within the principle of the de-

cision. Judges have differed as to the principle upon which Lawrence vs. Fox and kindred cases rest, but in every case in which an action has been sustained **there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise.** Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action, adopts his acts, or upon the doctrine of trust, the promisor being regarded as having received money or other thing for the third party, is not material. **In either case there must be a legal right,** founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." (Italics ours.)

The rule was applied in:

Constable vs. National Steamship Co., 154 U. S. 51, 38 L. ed. 903;

Lorillard vs. Clyde, (N. Y.) 25 N. E. 917, 10 L. R. A. 113;

Durnham vs. B——(N. Y.) 30 N. E. [illegible]

Elliot on Contracts, Vol. II,
Sec. 1413; Jefferson v. Asch,
25 L. R. A. 257.

And, see:

6 Ruling Case law, "Contract". Par. 275, on page 888.

V.

If we assume this to be a contract made for the benefit of Mrs. McNaught, she was required to take it just as it was made, and subject to all defenses that could be made against a direct party. The rule is well stated in 13 C. J. 699, Sec. 799, which reads in part:

> "One who seeks to take advantage of a contract made for his benefit by another must take it subject to all legal defenses".

In the case of Clay vs. Woodram, 45 Kan. 123; 25 Pac. 621, the Court held:

> "It is well settled in this state that, where one person agrees with another to do some act for the benefit of a third person, such third person, though not a party to the promise, may maintain an action against the first party for a breach of the agreement. Manufacturing Co. vs. Burrows, 40 Kan. 361; 19 Pac. 809; Mumper vs. Kelley, 43 Kan. 256; 23 Pac. 558; **The third party, however, who avails himself of such a contract, and claims under its provisions, is subject to the defenses arising out of the contract between the original parties."**

See, also, Hume vs. Atkinson, 54 Pac. 15.

ACTION ON CONTRACT BARRED.

We submit to the Court that if the action is based upon the theory of a promise made for the benefit of the third person, the cause of action is barred by the statute of limitations. The Statute of limitations applicable in Montana would be Section 6445, Revised Codes, reading as follows:

"Within eight years: An action of any contract, obligation, or liability, founded upon an instrument in writing."

It can plainly be gathered that the claimed obligations as such is the basic right which would be afforded by the alleged contract as distinguished from specific payments and that the failure to assert any claim at all for a period of eight years would bar any right that existed. The last payment that was made was October 14, 1910. (Tr. p. 6, par. 4). The complaint in this case was filed June 25, 1920. (Tr. p. 30).

The contract in its nature was one within the control of the parties thereof, Mrs. Smith and Mrs. Hoffman. Plaintiff in error would be obliged to show something more in her complaint than she has averred in order to avoid the statute of limitation. She would have to show that within the period of eight years the contract was actually an existing, virile contract between the original parties.

We respectfully submit that the decision by

the learned District Judge is in every respect correct and should be affirmed.

Respectfully submitted,

GUNN, RASCH & HALL,

BELDEN & DeKALB,

Attorneys for Defendant in Error.

"The functions of a complaint cannot be supplied by a reply" Waitev. Shumaker, 50 Mont.

No. 3659

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

PETITION FOR RE-HEARING

HOMER G. MURPHY,

Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

PETITION FOR RE-HEARING

The plaintiff in error respectfully moves, petitions and submits to this Honorable Court that there is here presented a case in which she may with propriety ask and petition that a re-hearing be granted herein upon the grounds and for the reasons following, to-wit:

I.

In its decision made herein on the 1st day of August, 1921, the Court, agreeing with the Supreme Court of Montana, holds that the instruments involved

herein "created in the grantee (Sadie Hoffman) an estate upon condition subsequent," and then this Court proceeds to decide that under the decisions of the Supreme Court of Montana plaintiff in error cannot recover herein by reason of a construction placed by it on section 4970 of the Revised Codes of Montana in the cases of McDonald v. American Nat. Bank, 25 Mont. 456, and Tatem v. Eglonol M. Co., 45 Mont. 367, although at the same time intimating that the rule as there announced as this Court views said decisions is against the weight of modern authority.

II.

We respectfully submit that the decision in the Supreme Court of Montana in the case of McDonald vs. American Nat. Bank, supra, has by inadvertence been misconstrued by this Court, and a most important part of said decision has been inadvertently overlooked. The Supreme Court of Montana in the McDonald case just before stating that portion quoted in the decision under consideration, laid down the following rule in construing Section 2103 of the Civil Code of Montana, which is now Section 4970 of the Revised Codes of Montana of 1907, saying, pages 494, 495:

> "In so far as they are applicable to the facts of the case at bar, the fundamental principles in the light of which Section 2103, *supra,* should be interpreted may be thus illustrated: An executed

> contract does not require a consideration to support it. *For example, a gift consummated is an executed contract.* But a contract of gift the subject of which is not delivered is *without consideration—a mere nudum pactum—and therefore not enforceable by the donee. The provisions of section 2103* do not embrace gifts not perfected or other executory contracts lacking consideration. It should seem to be manifest that the legislature did not intend to declare that an executory contract in which there is a promise to make a gift or to confer a gratuity upon a third person may be enforced by him." (Italics ours).

the opinion then follows in the words quoted in the opinion in the case at bar, but the Montana court further in the McDonald case on page 495 says:

> "We do not attempt to interpret the section further than the facts in this case seem to require."

The decision in the McDonald case merely holds that an executory contract, such as the one before it in that case, to fall within the provisions of Rev. Codes § 4970, must have a "consideration passing from the third party by virtue of which he may assert the existence of a promise in his favor."

The case of Tatem vs. Englonol M. Co., 45 Mont. 367, 373, was also one in which an executory contract was involved. In neither of said cases was a perfected or consummated gift considered.

Indeed, the Supreme Court of Montana entertained no such view of said section 4970 as is laid down by this court in the case at bar, for in passing upon the question of privity of contract, in the case of West. Loan & S. Co. vs. B. A. Co., 31 Mont. 448, 450, it said:

> "The general, perhaps universal, rule of law is that there must be either contract, or privity of contract, to constitute liability on the part of the abstractor. (*Symns* vs. *Cutler*, 9 Kan. App. 210, 59 Pac. 671). This rule of law is conceded by the appellant. "Privies" are defined as "persons connected together, or having mutual interest in the same action or thing by some relation other than that of actual contract between them." (Black's Law Dictionary, 940). "A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Section 2103, Civil Code; *Burton* vs. *Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *McLaren* vs. *Hutchinson*, 22 Cal. 187, 83 Am. Dec. 59).
>
> "The evidence in this case, being admitted for the purpose of this motion to be true, tends not only to establish privity of contract, but an actual contract, between the plaintiff and defendant with respect to this abstract. The defendant knew that the abstract was made for the exclusive benefit and use of plaintiff, and knew that the plaintiff would rely thereon. and the abstract

was delivered by the defendant to the plaintiff. Under this state of facts, there can be no doubt as to the liability of the defendant if the action can be maintained. (*Brown* vs. *Sims*, 22 Ind. App. 247, 53 N. E. 779, 72 Am. St. Rep. 308)."

See also the very latest views of the Supreme Court of Montana on Section 4970 in the case of McKeever vs. Oregon Mtge. Co., 198 Pac. Rep. 750, decided June 6, 1921.

In this case we have a completed gift of the contract between Mrs. Smith and Mrs. Hoffman, in which Mrs. Hoffman in consideration of the deed to her promises to pay certain money. The contract between those ladies was and is a chose in action which provided for certain monthly payments and the gift of that contract was as completely made by Mrs. Smith to plaintiff in error as any gift of that nature could be (See 12 Ruling Case Law, Title, Gifts: Nos. 18 to 24; 27), and knowledge of said gift was not only admitted but acquiesced in and consented to by Mrs. Hoffman by the payments she made to plaintiff in error for many months after the acceptance of the deed and the execution of the contract between herself and Mrs. Smith. A gift under the laws of the State of Montana is irrevocable and Mrs. Hoffman, by her conduct as admitted herein, is clearly estopped, under every principle of the doctrine of estoppel, from now asserting that there was no privity between Mrs. McNaught and Mrs. Smith. And its continued effective-

ness could not be infringed upon by any one other than plaintiff in error. A completed gift is recognized as property, the right to which cannot be taken away without due process of law, how much less so can it be taken away by any letter from Mrs. Smith, admittedly not founded upon any consideration, and written without the knowledge or consent of Mrs. McNaught. The contract furnishes a basis for the collection of $50.00 per month "for an unlimited time," and presumably meant either until the remarriage or death of Mrs. Hoffman, or until the death of plaintiff. The mere fact that the money was payable monthly, in the future, cannot be considered upon the question as to whether the gift was completed by the making of the contract because the right to collect this money was clearly given by it. The defendant could raise no question as to the delivery of this gift, because she had recognized and acquiesced in such delivery by the payment of the money due thereunder for the period of seven months.

The case of Ebel vs. Piehl, 95 N. W. 1004 (Mich.) is illustrative of this case and is as follows: In said case a father transferred to a son a house and lot and $1500 in cash. The son agreed to pay his sister $400 upon the death of the father, and orally promised the sister, in the presence of the father, to do so. After the father's death he discharged a mortgage against his sister's property for $196, and refused to pay the balance of the $400. The sister brought suit in as-

sumpsit on the common counts to recover the balance. The court held that the promise of defendant to the father was a chose in action which he could transfer and says:

> "In our judgment a fair construction of the conversation which occurred between the parties to this suit and the father after the property was received by the defendant, warrants, if it does not compel the conclusion that the father *did transfer to the plaintiff this cause of action.* This is not a case of a gift *in futuro,* and therefore is not subject to the law governing such gift. *Between the father and the plaintiff there was a gift—a gift of a promise to pay money in the future—of an existing cause of action.*" (Italics ours).

The court held that the sister might maintain the action against her brother.

If there was no other consideration from defendant in error to Mrs. Smith for such life estate than the promise to pay the $50.00 a month to plaintiff, as is admitted, then such payment is surely a valid consideration for the deed, and to allow Mrs. Hoffman to retain the property without the payment of the consideration, would be violative of every right of property.

By the assertion of Mrs. Hoffman in the Montana case, and by the decision of the Supreme Court of that

State based upon her contentions, the possibility of losing the life estate, as resulting from this non-payment, was forever removed from the contract. If she is correct in her present assertions, the result is that although she accepted to estate on a consideration that she should pay the $50.00 per month, she is released therefrom and holds the estate absolutely for life, on the letter from Mrs. Smith, which, we repeat, was admittedly not founded on a consideration, and to which Mrs. McNaught never assented, nor indeed knew of.

By the theory of defendant's counsel she willingly accepted the conveyance of this property upon *the consideration named*, or *subject to the charge against it*, and yet they now insist that she can abrogate or repudiate this condition without any payment of the consideration and hold the charged estate absolutely. In other words, she claims all the benefit and declines to assume any of the burdens which were imposed on her, and which she accepted and agreed to comply with.

If the payments to the plaintiff in error were not the consideration for the deed, but the transfer from Mrs. Smith to defendant in error was a gift, unquestionably it was a gift upon condition, and if defendant in error accepted and retains it she is bound to satisfy the condition. Such condition becomes a charge upon the estate which must be considered in the nature of an equitable lien.

No theory is advanced by defendant in error as to the manner or circumstances under which she procured this title to the above subject other than above suggested. It therefore must be treated either as an absolute gift or a sale to her by Mrs. Smith upon a valuable consideration. Taking either horn of this dilemma places Mrs. Hoffman entirely out of court in this case. If it was a gift, an absolute condition of the payment of $50.00 per month to plaintiff, was charged upon it. If it was transferred to her for a valuable consideration the only consideration, as the Supreme Court of Montana says, was that she should pay the $50.00 per month to plaintiff. In either case the $50.00 per month was absolutely agreed to be paid by her, and has never been legally abrogated.

The situation here presented certainly must affect the equitable consideration of the court. There is nothing in the record indicating the value of the property transferred other than it is apparent that it was a hotel building located in a prominent growing city of the State of Montana. Its actual value is perhaps immaterial. Certainly she must have considered it a valuable piece of property whereby she might obtain her livelihood and pay plaintiff the sum of $50.00 per month.

For these reasons it is most respectfully submitted that a re-argument of the case be had or that the decision of this Court should be that the judgment of

the District Court be reversed and the case remanded with directions to enter judgment for plaintiff in error.

HOMER G. MURPHY,
Attorney for Petitioner.

The undersigned, counsel for plaintiff in error, certifies that in his judgment the foregoing petition for re-hearing is well founded and that it is not interposed for delay.

(Signed) HOMER G. MURPHY,
Attorney for Plaintiff in Error.